FILED
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JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,897.

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Appellant.

Appendix to Brief for Appellant.

Appeal from the Judgment and Order of the United States District Court for the Eastern District of Pennsylvania.

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APPELLANT'S APPENDIX

RELEVANT DOCKET ENTRIES

June 8, 1953.	Complaint filed.
July 23, 1953.	Answer filed.
Nov. 2, 1955.	Jury called and sworn. Clary, J.
Nov. 2, 1955.	Trial. Witnesses sworn. Clary J.
Nov. 4, 1955.	Verdict in favor of plaintiff in the sum of $40,000 with interest at 6 per cent from October 12, 1951 to November 4, 1955.
Nov. 4, 1955.	Judgment in favor of plaintiff in the sum of $40,000 with interest at 6 per cent per annum from October 12, 1951 to November 4, 1955, together with costs filed. November 7, 1955 noted and notice mailed. Clary, J.
Nov. 4, 1955.	Defendant's Motion for Directed Verdict filed.
Nov. 9, 1955.	Defendant's Motion for Judgment in accordance with Motion for a Directed Verdict filed.
Nov. 9, 1955.	Defendant's Motion for a New Trial filed.
Feb. 28, 1956.	Order of Court denying defendant's Motions for Judgment in its favor and for a New Trial filed. Noted and notice mailed February 29, 1956.

RELEVANT PORTIONS OF COMPLAINT.

Plaintiff for her complaint herein alleges:

1. Plaintiff, Constance A. Stopper, is a citizen of the State of Pennsylvania and defendant is a corporation incorporated under the laws of the State of New York authorized to do business in the Commonwealth of Pennsylvania and having a place of business at 123 South Broad Street, Philadelphia, Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

First Count

Plaintiff for her first count herein alleges:

2. Commencing the 14th day of February, 1951, and thereafter up to the death of Eugene A. Stopper, to wit, October 12, 1951, Eugene A. Stopper, John P. O'Malley and John P. Gilboy were co-partners engaged in the business of architects and engineers under the name of Gilboy, O'Malley and Stopper.

3. The defendant, The Manhattan Life Insurance Company of New York, for the consideration of a premium of $535.20 paid in advance and a like sum to be paid on the 19th day of every three calendar months thereafter, did on the 19th day of July, 1951, execute and deliver to John P. O'Malley a policy of life insurance on the life of Eugene A. Stopper, No. 367,668, in the sum of $20,000.00, to be paid in case of death of the said Eugene A. Stopper, to the executor, administrators or assigns of John P. O'Malley of Scranton, Pennsylvania, a true and correct copy of the original policy being hereto attached and made a part hereof and marked Exhibit "A".

4. The said John P. O'Malley, the beneficiary abovenamed, by assignment dated March 4, 1953, assigned, for a valuable consideration, all his right, title and interest in

the aforesaid insurance policy unto the plaintiff, Constance A. Stopper, widow of said Eugene A. Stopper, the insured, and a true and correct copy of the assignment was duly filed with the defendant at its home office. A true and correct copy of the said assignment is attached hereto, made a part hereof, and marked Exhibit "B".

5. All premiums on the aforesaid policy were duly paid as the same became due; that the insured, Eugene A. Stopper, died on the 12th day of October, 1951; that notice and proof of death of the insured, Eugene A. Stopper, were given to defendant; within the time and in the manner required by the terms of the policy; payment of the sum of $20,000.00 was demanded from the defendant; that defendant has failed and refused to pay the same, and denies liability under the policy; that defendant is justly indebted to plaintiff in the sum of $20,000.00 on the aforesaid policy with interest from the 12th day of October, 1951.

WHEREFORE, plaintiff demands judgment against defendant on the first count for the sum of $20,000.00 together with interest from the 12th day of October, 1951.

SECOND COUNT

Further complaining of the above defendant and for a second count plaintiff alleges:

6. The defendant, The Manhattan Life Insurance Company of New York, for the consideration of a premium of $535.20 paid in advance and a like sum to be paid on the 19th day of every three calendar months thereafter, did on the 19th day of July, 1951, execute and deliver to John P. Gilboy, Jr., a policy of life insurance on the life of Eugene A. Stopper, No. 367,669 in the sum of $20,000.00, to be paid in case of death of the said Eugene A. Stopper, to the executor, administrators or assigns of John P. Gilboy, Jr., of Scranton, Pennsylvania, a true and correct copy of the original policy being hereto attached and made a part hereof and marked Exhibit "C".

7. The said John P. Gilboy, Jr., the beneficiary above-named, by assignment dated March 4, 1953, assigned, for valuable consideration, all his right, title and interest in the aforesaid insurance policy unto the plaintiff, Constance A. Stopper, and a true and correct copy of the assignment was duly filed with the defendant at its home office. A true and correct copy of the said assignment is attached hereto, made a part hereof, and marked Exhibit "D".

8. All premiums on the aforesaid policy were duly paid as the same became due; that the insured, Eugene A. Stopper, died on the 12th day of October, 1951; that notice and proof of death of the insured, Eugene A. Stopper, were given to defendant within the time and in the manner required by the terms of the policy; payment of the sum of $20,000.00 was demanded from the defendant; that defendant has failed and refused to pay the same, and denies liability under the policy; that defendant is justly indebted to plaintiff in the sum of $20,000.00 on the aforesaid policy with interest from the 12th day of October, 1951.

WHEREFORE, plaintiff demands judgment against defendant on the second count for the sum of $20,000.00 with interest from the 12th day of October, 1951.

Floyd W. Tompkins
Attorney for Plaintiff
1201 Fidelity-Phila. Trust Bldg.
Phila 9, Pa.

DEFENDANT'S ANSWER TO COMPLAINT

Defendant, The Manhattan Life Insurance Company of New York, in answer to the Complaint filed in the above case, avers:

1. Defendant admits that it is a corporation incorporated under the laws of the State of New York authorized to do business in the Commonwealth of Pennsylvania and having a place of business at 123 South Broad Street, Philadelphia, Pennsylvania, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), but it is without knowledge or information sufficient to form a belief as to the truth of the remaining averment of paragraph 1 of the Complaint.

First Defense

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2 of the Complaint.

3. Admitted, except that in the copy of the Complaint served upon defendant, one page of plaintiff's Exhibit "A" is erroneously duplicated and another omitted.

4. It is admitted that a copy of the instrument entitled "Assignment" which is marked plaintiff's Exhibit "B" was filed with the defendant at its home office, but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 4 of the Complaint.

5. For reasons more fully set forth below in its Third Defense, defendant denies the legal conclusion that it is indebted to plaintiff in the face amount of the policy with interest. Defendant admits the factual averments of the corresponding paragraph of the Complaint.

SECOND DEFENSE

6. Admitted.

7. It is admitted that a copy of the instrument entitled "Assignment" which is marked plaintiff's Exhibit "D" was filed with the defendant at its home office, but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 7 of the Complaint.

8. For reasons more fully set forth below in its Third Defense, defendant denies the legal conclusion that it is indebted to plaintiff in the face amount of the policy with interest. Defendant admits the factual averments of the corresponding paragraph of the Complaint.

THIRD DEFENSE

9. Defendant avers that the insured, Eugene A. Stopper, knowingly made false and fraudulent misrepresentations as to the state of his health, prior medical treatments, hospitalization and operations, prior symptoms, and prior applications for other insurance policies which were not issued, in order to induce defendant to issue the policies in suit, and in reliance on such misrepresentations defendant issued said policies.

10. Under the provisions of the policies in suit, they were not to take effect until they had been issued, delivered and accepted all while the health, habits and occupation of the insured, Eugene A. Stopper, were the same as described in the applications for such policies, and such issuance, delivery and acceptance occurred when his health was other than as described in said applications.

11. Upon learning of the false and fradulent statements made by the insured in his applications for the policies in suit, defendant denied liability under said contracts and tendered the return of the premiums paid thereon

which tenders were rejected by the named benficiaries under said policies prior to the date of their alleged assignment.

WHEREFORE, defendant denies that any sum of money in addition to the amounts of the premiums paid under the said contracts, tender of which has been made and refused, is due and owing under the contracts of insurance on which suit has been brought.

/s/ Owen B. Rhoads
Owen Rhoads
Attorney for defendant

EXCERPTS FROM TESTIMONY.

Philadelphia, Pa., November 2, 1955

Before Hon. Thomas J. Clary, J.

Present: Thompkins and McNally
by John M. McNally, Jr., Esq.,
for the plaintiff.
Owen B. Rhoads, Esq.,
for the defendant.

(2)* Mr. McNally: If Your Honor please, I will read from the pleadings in this case.

* * *

"Plaintiff, Constance A. Stopper, is a citizen of the State of Pennsylvania and defendant is a corporation incorporated under the laws of the State of New York authorized to do business in the Commonwealth of Pennsylvania and having a place of business at 123 South Broad Street, Philadelphia, Pennsylvania. The matter in controversy exceeds, exclusive of interest (3) and costs, the sum of Three Thousands Dollars ($3,000.00)."

Paragraph 2 is denied.

Paragraph 3, the facts are admitted, except for the correctness of the exhibit, so therefore I will read the rest of the paragraph, with the exception that the policy is a true and correct exhibit. I think there was one page left out of it.

"3. The defendant, The Manhattan Life Insurance Company of New York, for the consideration of a premium of $535.20 paid in advance and a like sum to

* Figures in parentheses refer to page numbers of typewritten transcript.

be paid on the 19th day of every three calendar months thereafter, did on the 19th day of July, 1951, execute and deliver to John P. O'Malley a policy of life insurance on the life of Eugene A. Stopper, No. 367,668, in the sum of $20,000.00, to be paid in case of death of the said Eugene A. Stopper, to the executor, administrators or assigns of John P. O'Malley of Scranton, Pennsylvania . . ."

Now we offer a true and correct copy.

The Court: You have the original policies, haven't you?

Mr. McNally: We have the original policies here.

The Court: What do you want to do? Are you going to offer them or furnish photostatic copies?

Mr. Rhoads: I have no objection to those originals being offered.

The Court: All right, let them be marked, then.

Mr. McNally: Mr. Reporter, will you mark these as Plaintiff's Exhibit 1 and 2, the two original policies in the case.

(Original life insurance policy No. 367668 was marked Exhibit P-1 for identification.)

(Original life insurance policy No. 367669 was marked Exhibit P-2 for identification.)

Mr. McNally: Paragraph 4—

Mr. Rhoads: May I say this, that so far as paragraph 4 is concerned, Your Honor will recall that at a pre-trial conference before Your Honor we took care of that by saying that we did not question the assignment of these two policies to Constance Stopper, the plaintiff.

The Court: I think we can then state that for the purposes of this case the assignments are recognized

and Constance A. Stopper is the proper plaintiff in this case.

Mr. Rhoads: That is correct.

The Court: I think that is enough. You don't (5) have to read anything else.

Mr. McNalley: Paragraph 5. The defendant admits all the factual averments, and they simply deny that they are indebted to us, so, therefore, I will read all the factual averments in paragraph 5:

"All premiums on the aforesaid policy were duly paid as the same became due; that the insured, Eugene A. Stopper, died on the 12th day of October, 1951; that notice and proof of death of the insured, Eugene A. Stopper, were given to defendant; within the time and in the manner required by the terms of the policy . . ."

Mr. Rhoads: That is admitted.

Mr. McNally: ". . . payment of the sum of $20,000.00 was demanded from the defendant, that defendant has failed and refused to pay the same, and denies liability under the policy . . ."

The Court: That is under 367,668.

Mr. McNally: That is under the first—

The Court: And that situation obtained then and still obtains.

Mr. Rhoads: That is correct, Your Honor, except that, of course, under the agreement of counsel arrived at a pre-trial, we have always offered to return (6) all premiums paid, and we still stand ready and willing to do that.

The Court: I understand that.

Mr. McNally: At this time, of course, we have waived any tender, as far as that is concerned.

The Court: The question of tender does not appear in the case. That is eliminated.

Mr. Rhoads: That is correct.

The Court: It is agreed that you have offered to return them and they have been refused.

Mr. Rhoads: That is right, and we still stand ready and willing to do so.

Mr. McNally: Paragraph 6 is admitted, so I will read the paragraph:

"6. The defendant, The Manhattan Life Insurance Company of New York, for the consideration of a premium of $535.20 paid in advance and a like sum to be paid on the 19th day of every three calendar months thereafter, did on the 19th day of July, 1951, execute and deliver to John P. Gilboy, Jr., a policy of life insurance on the life of Eugene A. Stopper, No. 367,669 in the sum of $20,000.00, to be paid in case of death of the said Eugene A. Stopper, to the executor, administrators or assigns of John P. Gilboy, (7) Jr., of Scranton, Pennsylvania, a true and correct copy of the original policy being hereto attached and made a part hereof and marked Exhibit 'C'."

The Court: The original has now been marked as Plaintiff's Exhibit 2. That is policy 367,669.

Mr. McNally: That is right, sir, and as Plaintiff's Exhibit 1 we offer the original of policy 367,668.

The Court: You now offer those in evidence; is that right?

Mr. McNally: I am offering them in evidence.

The Court: Any objection?

Mr. Rhoads: No objection, Your Honor.

The Court: All right.

(Exhibits P-1 and P-2 admitted in evidence.)

Mr. McNally: On paragraph 7 we have the same thing, and again they will probably admit the assignment.

The Court: The assignment is recognized, and Constance Stopper is the proper plaintiff in this action.

Mr. Rhoads: That is correct, Your Honor.

Mr. McNally: On paragraph 8 again the defendant admits all the factual averments of the corresponding paragraph of the complaint, and therefore I will read them in too:

"8. All premiums on the aforesaid policy (8) were duly paid as the same became due; that the insured Eugene A. Stopper, died on the 12th day of October, 1951; that notice and proof of death of the insured, Eugene A. Stopper, were given to defendant within the time and in the manner required by the terms of the policy; payment of the sum of $20,000.00 was demanded from the defendant; that defendant has failed and refused to pay the same, and denies liability under the policy . . ."

The Court: All right. Those averments may be received.

Mr. McNally: If Your Honor please, although the fact of death was admitted, if the defendant desires I shall offer in evidence the certificate of death for the fact of death only.

Mr. Rhoads: If Your Honor pleases, I have no objection to the certificate being offered and received for the fact of death and the cause of death. Therefore we can agree of record, I think—

The Court: Let me see it.

Mr. Rhoads: If Your Honor pleases, here is an original which is much cleaner and easier to read.

The Court: All right, it may be marked. That is an original certificate. Let it be marked, and it may (9) be offered. I see nothing on there except the ordinary information.

Mr. McNally: Will you mark the original certificate Plaintiff's Exhibit 3, Mr. Reporter.

(Original death certificate for Eugene A. Stopper was marked Exhibit P-3 and received in evidence.)

Mr. McNally: If your Honor please, upon the admissions in the pleadings and the introduction of the policies and the certificate of death, the plaintiff rests.

* * *

DEFENDANT'S EVIDENCE

CHARLES G. HINKLE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rhoads:

* * * *

(10) Q. * * * By whom are you employed?

A. Pan-American Life Insurance Company of New Orleans.

Q. In what capacity?

A. General agent.

Q. Mr. Hinkle, did you in answer to a subpoena served by me produce Pan-American Life Insurance papers concerning Eugene A. Stopper?

A. I did.

Mr. Rhoads: May I have those two papers marked for identification.

(Document headed "Part I of Application for Insurance" was marked Exhibit D-1 for identification.)

(Document headed "Part II of Application" was marked Exhibit D-2 for identification.)

By Mr. Rhoads:

Q. Mr. Hinkle, I show you two papers which have been marked for identification Defendant's Exhibits 1 and 2. Will you tell me what those are, please.

A. Part I is the application which is written by the agent, and Part II is the application, the examination made by the examiner for the company.

Q. And by whom are those signed?

A. They are signed by Eugene Stopper.

Q. And under what date?

(11) A. The application for the agent is June 5, 1951, and the examination—

Q. That is Part I?

A. That's right, and the Part II, for Dr. John P. Chapman, the examiner, on June 5, 1951, both in Philadelphia.

Q. What kind of life insurance was applied for?

A. The application calls for $25,000, with additional $25,000, or a total of $50,000.

By Mr. McNally:

Q. Where does that show in the application?

A. Under "special instructions," No. 9, it says, "Please issue an additional $25,000 same in all respects as above"—Part I, No. 9.

By Mr. Rhoads:

Q. Mr. Hinkle, from your file can you tell me what if any action your company took on that application?

• • •

(12) A. On June 15 I received from our medical director, Dr. Marion Souchon, a letter in which he said:

"We were not willing to accept this risk and submitted the papers for reinsurance."

It is captioned "Eugene A. Stopper" and the agent's name.

They also stipulated in the letter that they would submit this for reinsurance.

Mr. Rhoads: May I have that letter which the witness just read marked for identification.

(Letter dated June 15, 1951, from Marion Souchon, M.D., to Mr. C. G. Hinkle, was marked Exhibit D-3 for identification.)

By Mr. Rhoads:

Q. Can you tell us, Mr. Hinkle, whether a policy of insurance was issued by Pan-American to Eugene A. Stopper?

A. A policy was never issued because Mr. Stopper would not comply with our request.

Q. And what was that request?

A. For current EKG, that is, electrocardiogram, and chest x-ray.

Q. During what period of time were you requesting an electrocardiogram and chest x-rays from Mr. Stopper?

A. We requested from Mr. Stopper from June 15 until (13) August 2.

Mr. Rhoads: Cross-examine.

CROSS-EXAMINATION

By Mr. McNally:

Q. One letter which you read from was addressed to you from—

A. Marion Souchon, Medical Director.

Q. Mr. Rhoads asked you what request you made of Mr. Stopper. Now I ask you to look through that file and show me in your file a single request from you to Mr. Stopper to obtain an electrocardiogram.

A. The requests are made through me as general agent for the company, and we make personal request. We do not write letters for request. We make it through our doctor and they are made personally. I called Mr. Stopper on the phone and asked him if he would please go to Dr. Shine

for the EKG or the x-ray, and he said he would, and we could never get him over there.

Q. On what date did you request from him by phone that he go for an electrocardiogram?

A. I called him many times during that period. I don't have any specific dates, but I have called him many a time.

Q. Name any specific date.

A. I couldn't name a particular date. I have no reason (14) to remember a particular date.

Q. And you were still asking for that in August and September of 1951, weren't you?

A. No, up until August.

Q. And you can't pin down the date the request was made?

A. No, I couldn't. We never make a notation of the date, but we keep after the case so it can be expedited.

Q. You have no notation in your file as to when such a request was made?

A. No, sir, we never keep such a record.

Q. Now, you have the application there, and on that application, Part II, question 7a, the question being, "What physician did you last consult?" was there an answer to that question on the application?

A. There was.

Q. And what was the answer?

A. Dr. Daniel B. Pierson, two years ago, 1830 Delancey Street, routine checkup, annual.

Q. Will you look at that again. Isn't that "two months ago" instead of "two years ago" in that answer?

A. That may be months; that may be months.

* * *

(15) Q. Now, on the bottom of the application there is the usual form in which the patient authorizes his doctor to furnish professional information. Was that signed by Mr. Stopper on Part II of the application?

A. It was.

* * *

Q. As far as you can recall, the status of it was that your request for an electrocardiogram was never acted upon; is that correct?

A. The request for electrocardiogram and chest x-ray was never acted upon.

Q. So actually the application had never been processed and there was no rejection, was there?

A. There was a rejection. It was rejected by the company. (16) In the letter of June 15 it says, "We were not willing to accept this risk and submitted the papers for reinsurance."

The company would not accept the risk; therefore—

Q. What do they mean, for reinsurance?

A. We reinsure with other companies who will accept the risk if we won't, but the Pan-American would not accept this risk.

By the Court:

Q. What notice did you give to Mr. Stopper? Do you have any written notice there of rejection?

A. No, sir. As far as Mr. Stopper was concerned, sir, we were trying to get the insurance.

By Mr. McNally:

Q. You were trying to get the insurance?

A. That is right.

Q. And the only reason it wasn't issued was because there was no compliance with your request?

A. That's right.

Q. And if he had complied with your request, you would have issued the insurance?

A. I don't know that. That we don't know. In other words, if the EKG and the chest x-ray were favorable, we might have issued it.

(17) Q. Now, in answer in Part II to question 6g, "Have you ever had or been advised to have an electrocardiogram," what was the answer to that question?

A. The answer to that was yes.

Q. Did you check up on the results of that electrocardiogram?

A. These papers show that we did receive that electrocardiogram, and the company wanted a current electrocardiogram.

Q. And that one you did receive was dated when?

A. It doesn't give a date. It apparently wasn't a recent one, otherwise we would not have requested a current one.

Q. How far back did it go for current? Would you accept one a month old?

A. Oh, yes, we will accept one six months old.

Q. Did you check with Dr. Pierson to find out when that electrocardiogram was taken?

A. The electrocardiogram was sent to our home office, because we are not authorized or qualified to interpret electrocardiograms.

Q. Do you have the letter which—

(The witness handed a letter to Mr. McNally.)

Q. This is the letter to you, Mr. Hinkle, from your vice-president and medical director. Do you have in your file the letter which enclosed this electrocardiogram to the company, (18) that will show the date?

A. I do not have that, for the simple reason that it wasn't requested. The home office sent these to me. This was in the home office, and they sent it to me.

Mr. McNally: Well, then, we will show by other means when the electrocardiogram was taken.

By Mr. McNally:

Q. Do you have any requests in writing for the electocardiogram for Stopper addressed to Lester Weaver?

A. No, we do not. Lester Weaver was the agent. We deal with the doctor, not with the agent.

* * *

(20) Q. Mr. Hinkle, did you tell me that your usual custom was to communicate directly with the person to be insured in a case like this?

A. That's right.

Q. Rather than the agent. I show you a letter dated June 18, 1951.

Mr. Reporter, will you mark this letter for identification as Plaintiff's Exhibit 4.

(Letter dated June 18, 1951, from Pan-American Life Insurance Company to Mr. Lester U. Weaver, was marked Exhibit P-4 for identification.)

By Mr. McNally:

Q. I ask you if you can identify the signature on that letter.

A. I can.

Q. And that letter is from whom to whom?

A. It is to Mr. Weaver from Mr. Willing.

(21) Q. Who is Mr. Willing?

A. Mr. Willing is my brokerage manager.

Q. And under your jurisdiction?

A. Under my jurisdiction.

Q. What is the date of that letter?

A. The 18th day of June, 1951.

Q. What does the letter state?

A. "Dear Mr. Weaver:

"We are in receipt of a letter from Dr. Souchon, Medical Director, stating the above case submitted for reinsurance and we have received an offer of Table A, subject to an EKG with multiple precordial leads and also a heart x-ray.

"The EKG and X-ray may be made by Dr. William A. Shannon, Room 1701, 1500 Walnut Street, Philadelphia 2, Pa.

"I have talked with Dr. Shannon and you may advise Mr. Stopper any morning, with the exception of

Tuesday, will be agreeable to him. Dr. Shannon suggests 10:30 A. M. as the most suitable time.

"Cordially yours

"/s/ J. E. Willing
"Brokerage Manager."

Q. And that is the letter on your stationery, is it not?

A. That is on our stationery.

(22). Q. Would that letter or a copy of it be considered as part of the file in this case?

A. No, it would not.

Q. It was not in the file, was it?

A. No, it was not in the file.

Q. Do you state that the entire file is contained in what you brought in?

A. That's right.

Q. Why wasn't this letter in that file?

A. That letter is between the brokerage manager and an agent and is not part of the case. In other words, what the brokerage manager is trying to do is to expedite this business. It is the agent's business, and our brokerage manager is trying to acquaint him with the procedure.

* * *

Q. Will you go back to that original letter which is marked for identification, dated June 15, 1951, the one from the medical director to the—

Mr. Rhoads: It is marked for identification. (23) I don't think it is in the file. The stenographer has it.

Mr. McNally: I think I have it here.

By Mr. McNally:

Q. That is the first letter that you received, is it not, as to the status of the case?

A. That's right.

Q. And that is dated just three days before the letter of June 18, is that correct?

A. That's right.

Q. Will you read that letter.

A. "Mr. C. G. Hinkle

"Philadelphia, Pa.

"Dear Mr. Hinkle:

"RE: EUGENE A. STOPPER
(J. E. Willing)
L. N. Weaver, Broker
C. S. Teller, Broker

"We were not willing to accept this risk and submitted the papers for reinsurance.

"We have received an offer of Table A, subject to an EKG with multiple precordial leads and also a heart X-ray. These may be made by Dr. Shannon and the Company will pay a fee of $10.00 for each, without interpretation.

(24) "With kind regards, I am,

"Cordially yours,

/s/ Marion Souchon, M.D.
"Vice President & Medical Director."

Q. In cases like this—this involves, as you know, a man 66 years of age, and it was $40,000—

A. $50,000.

Q. $50,000, isn't it the usual procedure in cases of that size to reinsure all or portions of the policies of that nature with other companies?

A. Not necessarily.

Q. But it is frequently done, is it not?

A. Oh, yes, it is frequently done, but not necessarily. The company here so stated very definitely, that they are not willing to accept this risk. They declined this risk.

Q. They didn't decline; they just say they are not willing to accept.

A. Well, that is a declination. As far as we are concerned, if they don't take it, that is a declination; and through our brokerage facilities, then, they attempt to reinsure it for us in other companies whose business it is to take reinsurance. They are primarily reinsurance companies and do not have their own agents. Some of them do.

Q. But the letter simply states, "We do not accept," (25) without giving any reason for the non-acceptance, as far as the letter is concerned; isn't that correct?

A. This says, "We were not willing to accept this risk . . ."

Q. I just asked you what the letter says.

A. That's right.

Q. Of course, you weren't present, I don't suppose, with Dr. Chapman, were you, on June 5, 1951, when these applications were purportedly signed?

A. Nobody is ever present with the doctor during an examination. That is against any company's regulations. They must be alone with the patient.

Q. So you don't know of your own knowledge who filled in the answers to the questions?

A. Dr. Chapman.

* * *

Q. And do you know of your own knowledge whether the application was signed in blank?

A. I know that it is a company requirement—

Q. In this instance, I mean.

* * *

(26) A. I was not present at the time the application was signed.

Q. I think your records show that the last date you have in there is that as late as August 2, 1951, you were still awaiting completion of the case.

A. That's right.

Q. Incidentally, I have a letter here. I think that is part of your file, isn't it?

A. That's right.

Q. It came from your file?

A. It came from this file, that's right.

Mr. McNally: Will you mark this Plaintiff's Exhibit 5, please, Mr. Reporter.

(Letter dated July 26, 1951, from Marion Souchon to Mr. C. G. Hinkle, was marked Exhibit P-5 for identification.)

Q. This letter is from whom to whom?

A. This letter is to me from Dr. Marion Souchon, our vice-president and medical director.

Q. The date of the letter is what?

(27) A. July 26.

Q. Read the letter, please.

A. "As we have not heard from you since July 6, we hope that you will be able to secure a current EKG, to be completed on a string galvanometer machine with complete precordial and unipolar leads, as well as a chest X-ray.

"With kind regards, I am,

"Cordially yours,

"/s/ Marion Souchon, M.D."

Q. So at that time, too, it shows that Pan-American was still requesting an electrocardiogram?

A. For the reinsurance companies.

Q. On July 26, 1951?

A. That's right.

Q. Did you ever receive any electrocardiogram in this case?

A. Yes, we did.

Q. You did have knowledge of some?

A. Oh, yes. I gave you a letter. The letter of July 3 stipulates that we received the EKG. Dr. Souchon wrote to me on July 3, 1951, in which he says to me:

"We received the EKG which we told you to send us when talking to you on June 21 and we sent (28) it

to the reinsuring company, hoping that it would answer the underwriting requirements, and requesting that company to waive the heart X-ray. We also sent all of the papers, including the EKG, to other reinsuring companies in an effort to cover the full $75,000 applied for. We have now received replies from all of these companies and in each instance a current EKG is required which should be completed on a string galvanometer machine with complete precordial and unipolar leads. Each company also asks for a chest X-ray.

"As we wrote you on June 15, these may be made by Dr. Shannon and the Company will pay a fee of $10.00 each for the EKG and the X-ray, without interpretation.

"We hope that you will be able to secure these requirements for us within the next week or two as we are anxious to secure a final offer for you.

"With kind regards, I am,

"Cordially yours,

"/s/ Marion Souchon, M.D.

"Vice President & Medical Director."

Mr. McNally: That is all.

(29) REDIRECT EXAMINATION

By Mr. Rhoads:

Q. Mr. Hinkle, may I have that letter that Mr. McNally just asked you about?

A. Yes (handing).

Q. This is dated July 3?

A. That's right.

Mr. Rhoads: May I have that marked for identification, please.

(Letter dated July 3, 1951, from Marion Souchon to Mr. C. G. Hinkle, was marked Exhibit D-4 for identification.)

Mr. Rhoads: Mark that for identification, please.

(Letter dated August 2, 1951, from Marion Souchon to Mr. C. G. Hinkle, was marked Exhibit D-5 for identification.)

By Mr. Rhoads:

Q. You were also asked by Mr. McNally as to the letter of August 2, being the last letter that you had, I believe.

A. That's right.

Q. Is that the letter that you referred to, which has been marked for identification D-5?

A. That's right.

* * *

(31) DR. DANIEL B. PIERSON, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rhoads:

Q. Dr. Pierson, you are a practicing physician?

A. I am.

Q. A graduate of what institution and what year?

A. University of Virginia, 1930.

Q. Are you presently in practice in Philadelphia?

A. Yes, sir.

Q. How long have you been in practice here?

A. Since 1934.

Q. Specializing in any field of medicine?

A. Internal medicine.

Q. And you are a specialist in any division of internal medicine?

A. Mostly cardiology.

Q. Doctor, did you ever have as a patient Eugene Stopper?

A. I did.

Q. Did you in answer to a subpoena served by me produce here your records of treatments of Mr. Stopper?

A. I did.

Mr. Rhoads: May I see those records, please?

* * *

(32) Q. Doctor, will you look at this pile which I have just separated. That consists of correspondence with the attorneys, doesn't it?

A. Yes, this is correspondence between Mr. Tompkins and Mr. Landis.

Q. Mr. Tompkins being the plaintiff's attorney, Mrs. Stopper's attorney?

A. Yes, sir.

Q. And this paper which I show you, is that the subpoena which was served on you to appear here?

We can agree it is, can't we?

A. Is this the old one or the present?

Q. That is the old one, I am afraid.

A. Apparently I have the new one.

Q. You have testified that you were subpoenaed?

Mr. McNally: We will agree that he is here under your subpoena. There is no question about it.

The Witness: Here is the new one.

Mr. Rhoads: I ask that these be marked for identification.

(Records of Dr. Pierson were marked Exhibits D-6, D-7, D-8, and D-9 for identification.)

(33) By Mr. Rhoads:

Q. Doctor, I show you papers from your file which have been marked for identification Defendant's Exhibits 6, 7, 8, and 9 and ask you if you will identify those. What are they?

A. Those are the clinical records of Mr. Stopper.

Q. By whom were they made?

A. By me.

Q. Are they in your handwriting?

A. I think practically all are my handwriting. There might be a nurse's note in there, but I doubt it.

Q. And they were made under your supervision and control?

A. Yes, sir.

Q. Now, when do they show that you first saw Mr. Stopper and when did you last see him?

A. I first saw him March 12, 1945.

Q. And over what period of time did you see him?

A. I last saw him October 8, 1951.

Q. That was just prior to his death?

A. I think that was four days prior.

Q. And where did you see him on those occasions?

A. At my office at 1830 Delancey at that time.

Q. Doctor, will you turn to your records for the year 1951 and will you tell us on what dates, between the first of January of that year and July 19, 1951, you saw Mr. (34) Stopper?

A. I saw him on February 15, 1951; May 3, 1951; June 11, 14, 21, 1951; July 11, 13.

Q. Will you tell us what you saw him for on the date of the first visit in 1951, which I think you said is February 15, 1951.

A. That's right. He reported in at that time for a physical examination, which was his habit once a year.

Q. That is for a physical examination?

A. Yes, sir.

Q. And you say he had been having those once a year?

A. That is right.

Q. Now, the next date, you say, was May 3, 1951?

A. That's correct. Now wait just a minute. I skipped one there, April 14.

Oh, no, that is an X-ray. April 14, 1951, is an X-ray. May 3, 1951.

Q. Did he have an x-ray on May 14, 1951?

A. Yes, sir.

Q. Was that at your direction?

Mr. McNally: If I may interrupt, that is April 14, I think he said.

(35) By Mr. Rhoads:

Q. April, I am sorry.

A. I think that an insurance company wanted that, requested that.

Q. Will you tell us what that showed?

A. "Upper gastrointestinal X-ray by Meyer (Lankenau Hospital). Esophagus, stomach and duodenum and enterostomy and jejunum are normal. Emptying time is normal."

Q. Did that have anything to do with the heart?

A. No, sir.

Q. What was the next day on which you saw him?

A. May 3, 1951.

Q. What were his complaints when you saw him then?

A. He reported an episode of discomfort that he had had three weeks previously. Would you like me to read that?

Q. Will you tell us what history he gave you, what his complaints were?

A. "In Harrisburg three weeks ago walked about four blocks after eating a heavy dessert of some apple cake and had an all-gone feeling in his epigastrium, dyspnea and sweating requiring sitting to rest a while before going to a meeting. This has occurred once since after walking and mildly several times unassociated with eating except that during these three weeks things have been very busy and rather tense."

(36) Q. Doctor, what is dyspnea?

A. Shortness of breath.

Q. What did you do for him at that time?

A. Well, his examination showed that his blood pressure was 155/90. The heart was regular at 76. There were no murmurs. An electrocardiogram was ordered and was normal. Urinalysis was normal. He was given thiamine chloride, 10 milligrams after meals.

Q. What is that?

A. Vitamin B1.

Q. Did you order any X-ray?

A. No, sir.

Q. Was he X-rayed?

A. He was. I have a note he was X-rayed on May 28, 1951.

Q. What kind of X-ray was that?

A. X-ray of the chest.

Q. What did it show?

A. Dilatation and elongation of the aorta, no cardiac enlargement.

Q. When did you next see him?

A. June 11.

Q. What does dilatation and elongation of the aorta mean?

A. The aorta is the main vessel leading from the heart, and it was apparently thought a little broader and a little (37) longer than it might be normally, though that can be an anatomical variation.

Q. When did you next see him?

A. You are referring to after that X-ray? You are dating from the time of the X-ray?

Q. That is right.

A. June 11, 1951.

Q. What were his complaints at that time?

A. "Epigastric discomfort, then precordial pain and sense of choking and dull heaviness in the left arm shortly after breakfast and one to two times last week at other times of the day. Sounds like angina, but does not accompany exercise, etc. Blood pressure 140/80. (Belched several times while in the office). Is to stop coffee in the morning and to get Master 2-Step Test at hospital."

Q. What is the Master 2-Step Test at hospital?

A. It is an electrocardiographic test taken before and after exercise. We have two steps of a given height. They are two-sided, and the patient walks up and down the other side and up and down the other side many times and then the cardiogram is taken.

Q. Did you recommend he have that made in the hospital?

A. Yes, sir.

Q. What hospital?

(38) A. Lankenau Hospital.

Q. Was it made?

A. It was.

Q. What did it show?

A. From my records, "E.K.G. and Master 2 Step at Lankenau Hospital shows slight S.T. segment sag in some of the chest leads returning to normal in six minutes. Has stopped coffee in A.M. and more comfortable though has had small A.M. attack of short duration. Admits tension in new project. Re-check in one week and prescribe aminophylline if further symptoms."

Q. Doctor, what did the symptoms and the results of the Master 2 Step Test made at Lankenau Hospital indicate to you?

A. Well, it indicated to me—I thought that he had some anoxia of the myocardial wall, probably on the basis of some coronary narrowing.

Q. What is anoxia?

A. Lack of oxygen.

Q. You said cardiac narrowing?

A. Coronary vessels.

Q. Would you describe that a little more fully in layman's language?

A. Well, the coronary vessels are vessels that feed the heart muscle.

Q. And in your note you said, "Sounds like angina"?

(39) A. That's right.

Q. What is angina?

A. Angina is pain, but mostly when we speak of it as angina we mean pain around the heart due to coronary insufficiency.

Q. He had pain around the heart, did he?

A. Yes, he did.

Q. He complained of that to you?

A. Yes.

Q. What was the significance to you of the sense of choking and dull heaviness in the left arm on the three occasions on which he complained to you?

A. Well, I thought of it first as an anginal attack, though we can have it from other things.

• • •

Q. When did you next see Mr. Stopper?

(40) A. On June 21, 1951. "Attack yesterday."

Q. Will you tell us what history he gave you or what complaints he made to you on that visit. This was again at your office?

A. That's right.

Q. All of these visits were at your office?

A. That's right.

"Attack yesterday shortly after lunch lasting about two hours, then O.K. since. Feels sense of precordial discomfort today. Blood pressure 140/85. Heart is regular 72. Prescription for aminophylline, grains 3, three times daily, and nitroglycerine, grains 1/100 under tongue if needed for pain."

Q. Doctor, is there any significance to you in the fact that he gave you a history of an attack lasting about two hours?

A. Well, that is a sizable attack.

Q. And by "attack" what do you mean?

A. Well, I assume from that that his symptoms lasted about two hours, presumably the precordial pain, and what the severity of it was for two hours, I don't have in the notes.

Q. What is precordial pain?

A. Pain in front of the heart.

Q. Doctor, what did you prescribe?

(41) A. Aminophylline.

Q. What is aminophylline?

A. It is an arterial dilator.

Q. What is it for?

A. To improve the circulation through vessels if they might be narrowed or in spasm.

Q. For what disease is that therapy or treatment?

A. For hypertension or for angina.

Q. What else did you prescribe?

A. Nitroglycerine.

Q. And what is nitroglycerine?

A. That is an arterial dilator and a blood pressure lowerer as well.

Q. Did you instruct Mr. Stopper when to take these pills or medicine?

A. I did.

Q. What instructions did you give him?

A. The aminophylline was to be taken three times daily after his meal, the nitroglycerine grains 1/100 under the tongue if needed for pain.

Q. What is the effect of nitroglycerine when taken under the tongue?

A. To lower pressure and dilate arteries.

Q. Why did you prescribe that in addition to the (42) aminophylline?

A. In addition? Well, I wanted him to have the aminophylline regularly. It is more long acting. The nitroglycerine is short acting, but it is usually very quick to relieve pain if it is due to arterial narrowing.

Q. Did you give him those pills or did you give him a prescription to be filled?

A. I gave him a prescription.

Q. That was on June 21?

A. Yes, sir.

Q. When did you next see him?

A. July 11, 1951.

Q. What complaints or what history did he give you on July 11, 1951?

A. He had been in Cape May for ten days and felt well. He took nitroglycerine four times while he was there. He returned to Philadelphia yesterday and had an attack this morning requiring nitroglycerine. Blood pressure was 140/85. Heart was normal to physical examination, and the same medication was left on. I wanted to see him in two days to consider Kehlen, which was then a new and touted drug for angina.

Q. Doctor, in your opinion is there any significance to the fact that while he was in Cape May he took nitroglycerine four times?

(43) A. Well, four times in ten days would indicate that he had been more comfortable there, apparently, than he had been before.

Q. Would it indicate anything with respect to attacks of precordial pain?

A. Yes, I assume that is why he took it.

• • •

Q. Do you know why he was at Cape May?

A. I presume it was a vacation. He had a summer home there.

• • •

(44) Q. Doctor, do you consider it of any significance that during the period of ten days while he was on vacation at Cape May he took nitroglycerine four times and that he had an attack on the morning of July 11, 1951, just before coming to your office, which required nitroglycerine?

A. I assume that was for chest pain.

• • •

(45) Q. Doctor, you have given us all that you had in the notation for July 11, 1951?

A. That's right, yes.

Q. And what instructions did you give to Mr. Stopper about returning to your office

The Court: Return in two days, consider Kehlen, a new drug for angina; is that what you said?

The Witness: Right, yes, sir.

By Mr. Rhoads:

Q. When did you next see Mr. Stopper?

A. 7-13-51.

Q. What were his complaints and symptoms at that time?

A. My notation is:

"Has been better but still aware of precordial discomfort. Blood pressure 130/80. Heart is physiologic. Treatment with nitroglycerine as needed. Eskel 40 milligrams, 50 tablets. Start one at bedtime and (46) build to three a day unless nausea occurs."

Q. What is Eskel?

A. That was Kehlen made by Smith, Kline & French. Eskel is a trade name for their Kehlen.

Q. What is that, Dr. Pierson?

A. That is an arterial dilator.

* * *

CROSS-EXAMINATION

By Mr. McNally:

Q. Doctor, to go back over your visits with Mr. Stopper in 1951, the first visit on February 15, 1951, the purpose, as you stated, was for his physical checkup; is that correct?

A. That's right.

(47) Q. Now, the second visit, or the second notation you have, April 14, 1951, that was where he was sent for an X-ray to the Lankenau Hospital?

A. That is where I got the X-ray from the hospital and noted it in my record.

Q. And that was at the request of an insurance company; is that correct?

A. I think so.

Q. On May 3, 1951, the next visit, his complaint to you was that he had epigastric pains following a heavy dessert; is that correct?

A. Had an all-gone feeling in his epigastrium.

Q. Where is the epigastrium, Doctor?

A. In the angle between the ribs and front.

Q. It is the stomach region, isn't it, in layman's language?

A. Yes.

Q. And Mr. Stopper, over the years you had been treating him, had had stomach trouble, had he not?

A. Yes, he had.

Q. And this pain which he described on May 3, 1951, was similar to the troubles he had previously described, was it not?

* * *

(48) A. He had had epigastric pain in the past.

* * *

Q. Now, on that date you had an electrocardiogram taken, is that correct, May 3?

A. That's right.

Q. And were the results of that electrocardiogram reported to Mr. Stopper?

A. Yes, as normal.

By The Court:

Q. Did I understand you to say "as normal"?

A. As normal.

By Mr. McNally:

Q. In other words, you told him that the results were that the cardiogram was normal. On June 11, when he came in the next time—incidentally, May 3, 1951, was the first time he came with any complaint, was it not? The previous two visits, or the visit in February, was his physical check-up, and the notation in April was for an X-ray examination; isn't that correct?

A. That's correct.

Q. And then on June 11, 1951, he did make a complaint, did he not?

A. Yes, sir.

(49) Q. And that complaint was epigastric discomfort?

A. Yes.

Q. Now, you have a notation of precordial pain. That is a medical term, is it not, precordial?

A. Yes.

Q. And it describes what?

A. Precordial is in front of the heart.

Q. Just where is the heart? Can you just point out about where it is?

A. To the left of the midline, more to the left than the right.

Q. Is it any particular distance up from the stomach in every individual?

A. As a matter of fact, there is only the diaphragm between the heart and stomach, and the diaphragm is about one-eighth of an inch thick.

Q. The pain he described was a pain in a region which was separated from the epigastric region by only one-eighth of an inch; is that correct?

A. No, sir.

Q. Explain it.

A. The pain is precordial, over the front of the chest or in front of the heart. The epigastrium is low in the angle below the ribs, and this was more in this area (indicating).

(50) By Mr. Rhoads:

Q. Doctor, what area are you describing?

A. Here (indicating), to the left of the sternum and more in the chest.

By Mr. McNally:

Q. And about how far up from the general epigastric area is that in inches?

A. The epigastrium is not in the chest; it is below the ribs.

Q. Right.

A. Anything in front of the heart we would call precordial. It might be the lower ribs; it might be up here (indicating).

Q. It might be just as far down on your anatomy as your epigastrium; is that correct? I mean it might be down here and your epigastrium region might be there (indicating)?

A. That is possible, that is possible.

Q. Certainly Mr. Stopper, when he described the pain to you, did not use the word "precordial pain," did he?

A. No, sir.

Q. Now, on that particular day you stated that it sounds like angina but does not accompany exercise; is that correct?

A. Yes, sir.

Q. The usual angina pain comes immediately after exercise, does it not?

(51) A. Either with it or after it.

Q. And in this case there was no notation of exercise being engaged in rigitt before the pain?

A. No.

Q. You made no prescription at that time, did you, Doctor, on June 11, 1951?

A. No, sir.

Q. Did you send him for the electrocardiogram on June 14, 1951?

A. That's correct.

Q. That showed a slight S.T. sag in some of the chest leads; is that correct?

A. After exercise.

Q. It is possible for a normal heart to show some S.T. sag, is it not, Doctor?

A. Yes, some.

Q. And six minutes is not a lengthy period in which to return to normal, is it?

A. No.

Q. When he came back the next time on June 21, 1951, at that time he came back in response to your direction, did he not, Doctor?

A. I had told him to come back in a week unless—if further symptoms.

(52) Q. And on that particular date you prescribe the nitroglycerine for the first time?

A. Aminophylline and nitroglycerine.

Q. Nitroglycerine, I mean.

A. That's right.

Q. Nitroglycerine you have described as an arterial dilator. Will you explain what you mean by that, Doctor.

A. Well, the arterial wall is smooth muscle. Nitroglycerine has a factor in relieving spasm in smooth muscle. If the vessel were tight, if the dilatory ducts, which are also smooth muscle, are tight, the nitroglycerine may relax them, and if pain is coming from that spasm, it helps.

Q. The use of nitroglycerine is to relieve muscle spasm in any kind of artery; is that not correct?

A. Yes. It is more effective in cardiac muscle than anywhere else.

Q. But if you had epigastric pains accompanied by some muscle spasm, would nitroglycerine be a prescription for that type of illness?

A. It is often used in gall bladder pain.

Q. And, of course, as you stated, Mr. Stopper had a history of epigastric discomfort over the years?

A. Yes, sir.

Q. On this date, June 21, 1951, what was the nature of (53) your prescription of nitroglycerine? Was it a diagnosis or a prescription for a known condition or did you consider it a trial therapy under the circumstances?

A. Well, I always consider it a trial therapy because it does not always relieve pain, regardless of its origin.

Q. So at that time your purpose was to prescribe nitroglycerine to see what it would do under the particular circumstances; is that correct?

A. That's correct.

Q. Which is different from a prescription for a known, certain diagnosis, is it not?

A. The prescription is the same. The purpose is different?

Q. You correct me, because I am very ignorant on that. Yes, that is it, the purpose is different, although the prescription is the same.

July 11 was twenty days later, and that was the next visit of Mr. Stopper to you, was it not?

A. Yes, sir.

Q. At that time he stated that he had taken nitroglycerine four times between the time you first prescribed it on June 21 and that date?

A. Yes, sir.

Q. Did he come back on July 13 at your insistence, two days later, July 13, 1951?

(54) A. That is correct, yes.

Q. And at that time I think you said, "Has been better but still aware of precordial discomfort"?

A. That's correct.

Q. Now, I also see noted on that date, "The heart is physiologic." What does that mean, Doctor?

A. That is a notation meaning that by listening, and any physical examination that I can do in the office, the heart is normal.

Q. On that date or at any time prior thereto did you tell Mr. Stopper that he had a heart condition?

A. I have no notation that I did.

Q. Do you know whether you did or not? That is prior to July 13, 1951.

A. To my knowledge, I didn't frankly tell him that he had heart trouble.

Q. At that time had you told him to slow down his activities?

A. I have no notation of that.

Q. Do you recall telling him that?

A. No.

Q. The vacation which he took on July 11, 1951, that was not at your direction, was it?

A. No, sir.

(55) Q. Doctor, I am going to ask you to go back to your records to a visit of November 28, 1946. That is going back a ways. I think you have it on your records there, if you will.

A. November 25, 1946?

Q. I have it as November 28, 1946.

A. It could be. There was only one visit in November, anyway.

* * *

Q. Doctor, during the time that you were examining Mr. Stopper during the year 1951, at that time you knew of his business activities, did you not?

A. Yes, sir.

Q. And did you know that he was engaged in a new association and project at that time?

A. Yes, sir.

Q. Do you know the hours that he worked on that new business?

A. No, sir.

(56) Q. But he did during that period of time—I think you made a notation in direct examination—complain of being under tension in his new business association?

A. I am sure that's in the record, but I don't know just what day it is entered.

Q. Doctor, you were the family physician for Mr. Stopper, were you not?

A. I presume so.

Q. And when he first consulted you it was as a general physician, was it not?

A. That's right.

Q. And not as a specialist?

A. No.

* * *

REDIRECT EXAMINATION

By Mr. Rhoads:

Q. Doctor, Mr. McNally asked you about his complaints of epigastric pain when you saw Mr. Stopper on May 3, 1951. In addition, he had other complaints at that time, didn't he?

A. Yes, shortness of breath and sweating.

Q. Had he had those complaints before?

A. I think that was the first time I had ever seen Mr. Stopper when he complained of anything in particular. Whether that had accompanied his other ulcer pain or not. I am not (57) sure.

Q. When you saw him on June 11 he had complaints in addition to the epigastric pain, didn't he?

A. Yes.

Q. What were those?

A. Precordial pain, sense of choking, and dull heaviness in the left arm.

Q. Had he ever complained to you before of pain in the heart, in front of the heart?

A. Not to my knowledge.

Q. Doctor, what terms did he use when he described to you his precordial pain?

A. I presume he would point out the area where he felt it.

Q. And then you marked it down as precordial pain?

A. That's right.

Q. Which you have described as pain in the region of the chest?

A. That's right.

* * *

Q. Can you have anginal pains without exercise?

A. Yes.

(58) Q. What was his first complaint to you when he came back to see you on June 21, 1951?

A. "Attack yesterday shortly after lunch lasting about two hours."

Q. Do you recall his description of that attack?

A. I have no note of it, no, sir.

Q. What were you treating him for, Doctor, from May 3, 1951?

A. Well, certainly after that bout of pain or discomfort in Harrisburg, we had in mind the possibility of angina, but he got no treatment for it until June, June 21.

* * *

(61) Q. Doctor, for what condition were you prescribing the nitroglycerine?

A. For the syndrome of pain, epigastric, precordial, and arm.

Q. And for what condition were you prescribing the aminophylline?

A. The same thing.

Q. And for what condition were you considering the Kehlen therapy?

A. The same thing.

Q. Doctor, on July 11, 1951, you told Mr. Stopper to return on what date?

A. In two days.

Q. Which would be July 13, 1951?

A. That's correct.

Q. And he returned to your office on July 13, 1951, didn't he?

A. Yes, sir.

Q. Doctor, in answer to a question by Mr. McNally you said, (62) I believe, that you had no notation on your records as to whether you told Mr. Stopper that he had angina or a form of heart disease; is that correct?

A. That's correct.

Q. Do you have a notation on your records as to whether he suspected he had cardiovascular disease?

Mr. McNally: I object to that question.

Mr. Rhoads: And the date.

Mr. McNally: If Your Honor please, to clear the point up, I would show you the date of this notation, which was almost a year after Mr. Stopper's death.

The Court: Let me see it.

(Paper handed to the Court.)

The Court: You object to the question?

Mr. McNally: I object.

The Court: I will sustain it.

Mr. Rhoads: Your Honor will grant me an exception?

The Court: Surely.

By Mr. Rhoads:

Q. Doctor, in your opinion, did Mr. Stopper suspect he had a heart condition?

Mr. McNally: I object to that, Your Honor.

The Court: I will sustain the objection.

(63) By Mr. Rhoads:

Q. Doctor, does a normal electrocardiogram eliminate angina pectoris?

A. No, sir.

* * *

Q. What was your answer, Doctor?

A. No, sir.

Mr. Rhoads: That is all. Thank you, Doctor.

* * *

(65) Mr. Rhoads: If Your Honor pleases, I offer in evidence Defendant's Exhibits 1 through 5, and I also

offer in evidence Defendant's Exhibit 9. I also offer in evidence; because I don't think the plaintiff has done it as yet, Plaintiff's Exhibits 4 and 5.

(The following took place at side bar:)

Mr. Rhoads: As to D-9, I am only offering this side (indicating). There were no questions on this (indicating) at all, and if that can be pinned or taped, it can be excluded from the jury.

• • •

(68) The Court: Well, I think that is all right. I will admit them all.

(Exhibits D-1 to D-5 inclusive and Exhibit D-9 admitted in evidence.)

(Exhibits P-4 and P-5 admitted in evidence.)

(End of proceedings at side bar.)

Mr. Rhoads: If Your Honor pleases, I submit this motion under Rule 50, and that is the defendant's case.

The Court: I will deny the motion.

(THE DEFENDANT RESTED)

• • •

(69) PLAINTIFF'S REBUTTAL EVIDENCE

JOHN P. GILBOY, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McNally:

Q. Mr. Gilboy, what is your residence?

A. My residence is Waverly, Pennsylvania.

Q. Did you know the decedent in this case, Eugene A. Stopper?

A. Yes.

Q. Did you have a business relationship with him in the year 1951?

A. Yes.

Q. What was that relationship?

A. He was a partner in an architectural engineering firm of ours.

Q. When was that partnership formed, if you know?

A. I believe January, 1951.

Mr. McNally: Will you mark this P-6, Mr. Reporter.

(70) (Document headed "Partnership Agreement" was marked Exhibit P-6 for identification.)

Mr. Rhoads: May we see Your Honor at side bar before any questions are asked with reference to this?

(The following took place at side bar:)

Mr. McNally: I am going to question Mr. Gilboy to identify the signatures on the partnership agreement, and then I am going to ask him questions that pursuant to that agreement did the various partners take out insurance, to show the purpose for which the insurance was taken out, that each one took it on the other partners and that the premiums were paid by the partnership, and then I will develop later that after the death of Stopper, they were assigned to Mrs. Stopper, showing a purpose for the insurance. It was a new business, and the partners decided to take out insurance on each other's lives.

Mr. Rhoads: If Your Honor please, that is objected to as being immaterial and irrelevant to the issues in this case. It makes no difference what his business was or for what purpose the insurance may have been taken out.

Mr. McNally: It shows the good faith of the insured. He wasn't trying to get a lot of insurance (71)

for himself. The insurance, if placed, gave him no benefit. One policy was payable to Mr. Gilboy, and one policy was payable to Mr. O'Malley. At the date of his death his family had no interest in the insurance.

Mr. Rhoads: If Your Honor pleases, that is immaterial to the issues in this case. The issues in this case as they presently stand are whether there was an application pending and outstanding with Pan-American Life or not and whether he had been treated by Dr. Pierson within a period so recent to the date of his application that he either knew or must have known. Those are the sole issues in this case as it now stands.

Mr. McNally: One of the controlling issues in the case is the good faith of the insured, and I contend that this document is background for the good faith of the insured in taking out the insurance—on the whole question of good faith.

The Court: I will overrule the objections to the testimony and permit it to go in.

Mr. Rhoads: If Your Honor pleases, while we are here, I think we can probably save time if I ask for an offer of proof in connection with this witness, and, possibly, if Your Honor would permit it at this (72) one time, in connection with the others, so that I am protected on the record.

The Court: Well, the general outline of what this witness is to be questioned about has been stated, and I think it is relevant and pertinent testimony.

Mr. McNally: That is on this point. In addition, I will ask the same questions which I am going to ask the other witnesses on the general good health of the insured, what the insured did by his actions, whether he ever indicated he had a heart condition, and so on.

Now, all those are pertinent to what knowledge the insured had of his condition, and they are corro-

borating evidence to combat the allegation that he knew he had a serious condition at the time he took out the application. I will show by this evidence that he not only didn't know it then but never knew it, and that will be the purpose of the testimony of Mr. Gilboy and the testimony of the other witnesses whom I will call, who will be Mrs. Stopper, the man's daughter, Mrs. Newpher, the man's personal secretary, Miss Ottinger, and the man's personal assistant, Mr. Walter Miller, who was with him in Scranton two days before his death.

The Court: You said you were going to call (73) Weaver, too, didn't you?

Mr. McNally: Weaver is on a different point.

Mr. Rhoads: If Your Honor please, may I enter an objection to the testimony of any of these witnesses, for the reasons which I just heretofore gave, because it is immaterial and irrelevant to the issues raised, and they would not be competent to testify or to answer questions as to whether he acted as though he had heart disease or any form of disease.

The Court: Well, I will permit the general outline of the testimony and hold that it is relevant and pertinent, but if there are any particular questions that seem out of line under the applicable rules of evidence, I would expect you to make objection at that time. I am not giving you a blanket exception except as to the purpose, and for the purposes outlined I think it is pertinent and relevant and I will admit it.

Mr. Rhoads: And for that purpose my objection may stand to all of the witnesses.

The Court: Yes, your objection goes to their ability even to testify.

Mr. Rhoads: That is correct.

The Court: And I hold they may testify.

Now, what is the situation as to Weaver?

(74) Mr. McNally: As to Weaver, it is on a different point. I am going to show that he had charge of the general insurance program for this purpose of placing all the insurance. He is the one that placed it with different companies, that in line with that the requests were made to him for the cardiogram, that Stopper was running around the country and he didn't know the status of the various applications at any time. As a matter of fact, Mr. Weaver will testify that he signed three or four applications in blank, and he would process another, so that at any particular point Stopper himself did not have knowledge as to what applications were pending and were not pending, which will raise the issue as to whether he had any knowledge of the pending application, among other things, of Pan-American at the time he signed the application on July 13.

Mr. Rhoads: I take it that under Your Honor's previous ruling you would permit Mr. Weaver to testify over my objection to the man's activities—

The Court: And the circumstances under which this and other applications were signed, certainly.

Mr. Rhoads: But, if Your Honor pleases, I object to his competency and the relevancy and the (75) materiality of that evidence. I also object to any testimony being received from this witness as to the signing of other applications or as to whether they were in blank or in whose handwriting they were or anything of that sort, because that evidence is absolutely inadmissible in a case of this type. As you know, the application here shows that the applicant Stopper certified that he had read the applications, that they were full, true, and correct, and that statements or knowledge of any agent

would not in any way be binding. That is on the authority of against Metropolitan Life Insurance Company, 340 Pennsylvania.

The Court: I will permit it.

Mr. Rhoads: Your Honor will grant me an exception.

(End of proceedings at side bar.)

By Mr. McNally:

Q. Mr. Gilboy, I show you a paper marked Plaintiff's Exhibit 6 and ask you if you can identify what that is.

A. I believe this is a partnership agreement between Mr. Stopper and Mr. O'Malley and myself.

Q. Will you look at the signatures on the agreement. Can you identify those signatures from your own knowledge?

(76) A. Yes, they are my signature, Mr. O'Malley's, and Mr. Stopper's.

Q. And the date of that contract?

A. * * * I can identify the signatures of the three principals of the partnership. I don't know that one signature who is witness as to Mr. Stopper, but I do know the other as our accountant, Mr. Muldowney. The date is 21 March 1951.

Q. What was the purpose of this particular contract? Any particular business enterprise into which you were entering at the time?

A. Well, sir, at that time this was made specifically for a partnership directed at some activities in which we were entering with Mr. Stopper. At that time I was in partnership and in a corporation with Mr. John O'Malley. The address of our corporation and partnership was at Scranton, Pennsylvania. We entered into partnership with Mr. Stopper to do several military projects. I believe at that time there was a Tobyhanna Signal Corps job project under way. That partnership was pointed specifically at the performance of (77) that project.

Q. What was the estimated cost of that project?

* * *

A. Twenty-nine million dollars.

* * *

Q. After this partnership was formed, did you together with your other partners agree to take out the insurance pursuant to the partnership business?

A. Yes, sir.

Q. What was that arrangement?

A. Well, the arrangement was that in the event of the death of any of the partners, that the partner's interest in the partnership would be offset by the receipts of the insurance program that we established. Each of the partners was to take out a sum of money that would offset his interest in this particular partnership. I am pulling from memory, but I believe that the sum that each of us took out was a hundred thousand dollars, scheduled to take out a hundred thousand dollars.

Q. Pursuant to that arrangement, when Mr. Stopper would take out insurance and that would be payable, would that be payable one policy to you and another policy to Mr. O'Malley? Is that the way that arrangement works out?

(78) A. I don't recall the exact contract partnership agreement here, but in our other agreements, where there were two of us involved as a partnership, that was payable to the other in the event of one's death, and in the event of a corporation, it was payable to the corporation, and here I believe it was payable to the remaining partner for his interest.

Q. I show you the Exhibits P-1 and P-2 in this case, P-1 being the Manhattan Life Insurance Company policy No. 367,668, and ask you to whom that was payable.

A. This is to the administrators of John P. O'Malley.

Q. And I show you the policy No. 367,669 and ask you to whom that was payable.

A. To myself, John Gilboy.

Q. And that is the arrangement which you agreed upon. Do you know of your own knowledge who paid the premiums on these two policies at that time when they were taken out?

A. I believe that the partnership did.

Q. At the present time do you have an interest in that policy which is payable to you, the policy payable to John P. Gilboy, Jr.?

A. On whose life?

Q. On Mr. Stopper's life.

A. Do I have an interest?

Q. Yes. Are you in this policy?

(79) A. I do not believe so.

Q. If you know, who is the beneficiary under that policy now?

A. I am recalling from memory, but I believe Mrs. Stopper.

* * *

(80) Q. During the year 1951 how often, after the partnership was started on the 21st of March, 1951, did you see Mr. Stopper?

A. Well, it was periodic. When I was resident in the country, I would see him perhaps once a week. Until perhaps August of that year I saw him several days a week, and starting in August I spent most of my time in Europe with another portion of work in the firm, and I saw him once every two weeks or once every three weeks.

Q. What was his particular duty in this partnership?

A. He was ecoperating and handling the design of the —Mr. Stopper's principal work in this partnership was to handle the architectural design and coordination of work on the Tobyhanna project.

Q. That is, he was the architect and you and Mr. O'Malley were in a different profession?

A. Correct.

(81) Q. And your profession was what?

A. Engineering.

Q. When you did see Mr. Stopper and worked with him, what did you observe of his condition? Did he work hard, and what hours on the job?

A. Well, Mr. Stopper worked very hard. At that time we were overburdened with work. We were placed under a great deal of pressure by the Corps of Engineers to get this job under way. If you would recollect the date, it was following the Korean situation,—and we were placed under pressure to get this depot finished so that the Signal Corps could move into it, and before we could complete it we, of course, had to finish the drawings.

I don't know Mr. Stopper's schedule before I met him—I didn't know him very well before December of that year,—but like myself I believe he worked around the clock. I worked fully 18 hours a day all during that time and I know that he spent considerable time with us when we were here in Philadelphia.

* * * *

(82) Q. What was the status of your work during the months of September and October 1951? Had it eased up or was it the same or had it become more burdensome?

* * *

A. Well, at that particular time I had spent some time in Europe with the Air Forces, and we had just received an additional contract that placed us under about an equal obligation of manpower and work in England, and it became Mr. Stopper's and Mr. O'Malley's function in the United States here to man this job for me. I know that at that particular time I tossed the responsibility of hiring maybe 25 or 30 additional key personnel at Mr. Stopper, and Mr. Stopper at that time was going through the routine of interviewing and hiring people, in addition to the regular function he had of designing Tobyhanna.

Q. Do you know the date of Mr. Stopper's death?

A. Sir, I recollect it with the holiday. I think it is Columbus Day.

Q. What year?

A. October, 1951.

Q. Taking that Columbus Day as October 12, did you (83) see Mr. Stopper on either October 10 or October 11 of that year?

* * *

A. Mr. Stopper came to Scranton for a staff conference on October 11. We were at that time sending people to England, and he was interviewing them and hiring them, and our staff, both legal and accounting at that time, were making contracts for these personnel. I believe that the key man for that left the afternoon of October 12, Mr. Schultz. I was with Mr. Stopper practically all day the 11th and probably until 2 o'clock in the morning of October 12. We completed a series of conferences through past midnight at the Hotel Casey in Scranton.

Q. Were those sessions up to 2 A. M. on the morning of October 12 for business discussions?

A. Yes.

Mr. McNally: You may cross-examine.

Mr. Rhoads: No questions.

WALTER J. MILLER, JR., having been duly sworn, was examined and testified as follows:

(84) DIRECT EXAMINATION

By Mr. McNally:

Q. Where do you live, Mr. Miller?

A. 1016 Oak Lane Avenue, Philadelphia

Q. Did you know the decedent, Eugene A. Stoppe ?

A. Yes, sir.

Q. What was your relationship with Mr. Stopper?

A. I was an employee, chief draftsman.

Q. How long were you in that capacity?

A. Since 1945, September, 1945.

Q. In your work as Mr. Stopper's assistant—well, we will pin it down to the year 1951—how often did you see Mr. Stopper?

A. Daily while he was working.

* * *

Q. What was Mr. Stopper's business?

A. Professional architectural business up until the partnership, and we were conducting quite a volume of work.

(85) Q. And your job with him was what?

A. Chief draftsman, and Mr. Stopper made all the outside contacts, visited all the projects, interviewed all the clients, and set up all the programs.

Q. Will you describe in general what his work was as an architect? What kind of jobs did he have?

A. Institutional, industrial, and commercial work.

Q. Can you name some of the institutions during that period?

A. Philadelphia State Hospital, Building N-8 in Byberry—that is over-active female patients' building—Philadelphia General Hospital kitchen building, Rush Hospital—we were just completing the Rush Hospital addition in Malverne, Pennsylvania; and L. & S. Dining Corporation. We had a continuous account there. Frankford Hospital in Frankford, Philadelphia.

Q. During the year 1951 what were the activities of your firm, Mr. Stopper and yourself, in the year 1951?

A. The work load that Mr. Stopper had continued, of course, while the buildings were under construction. In addition, the merger with Gilboy and O'Malley brought on additional work, the Tobyhanna project, which is a $35,000,000 project, and foreseeable oversees work which Mr. Gilboy and Mr. Stopper were arranging.

Q. During the year 1951 how many hours a day did (86) Mr. Stopper work?

A. It is hard to say, because our offices were split, but I would say he averaged sixteen hours.

Q. How many days a week?

A. I worked with him five days a week.

Q. During that time that you knew him what did you observe from your own observation of his physical condition?

A. He was healthy and energetic.

Q. Did he make any complaints of his condition during the year 1951, particularly from May on, as to any trouble he was having?

A. No, sir.

Q. Did he in the latter part of that year from June, 1951, until October, 1951, continue working at the same pace? Did he ease up or did he work hard?

A. He worked at the same pace but met all the demands of the work load, which were increased, as I said before.

Q. When was the last time you saw him prior to his death on October 12, 1951?

A. I was with him at the time of his death.

Q. And where did that take place?

A. Casey Hotel.

Q. And where is that?

A. Scranton, Pennsylvania.

(87) Q. And how long had you been in Scranton at that time?

A. I don't recall whether it was two days or a day and a half, but I know we were there the 11th.

Q. What were Mr. Stopper's business activities on the date of October 11, of which you have knowledge?

A. We were developing the key personnel for our enlarged programs by interviews and alignment of work.

Q. And that enlarged program was to take place where?

A. In Europe.

Q. What time did your work day start on October 11, 1951, if you recall?

A. No, I don't.

Q. How late did you work that night with Mr. Stopper?

A. I left Mr. Stopper between one and two in the morning.

Q. One and two A. M.?

A. In the morning.

Q. And up until that time was it business you were discussing or was it social?

A. A series of conferences, business conferences.

* * *

(88) Q. Did you see Mr. Stopper the next morning, the morning of October 12?

A. Yes, sir.

Q. What time did you first see him that day?

A. He called me at 6. I met him at 6:30 in the morning.

Q. And then when did you next see him that day?

A. We had breakfast and discussed our business operations for the day, and it was our intention to return to Philadelphia that morning, and I made the arrangements with our Scranton office and left him, I would say, between 8 and 8:30. I returned to the hotel to meet Mr. Stopper to return to Philadelphia between 8:30 and quarter of nine. I couldn't get into the room at first, so I went to the clerk at the desk and I gained admittance to the room.

Q. Was Mr. Stopper there?

A. He was sitting on the edge of the bed moaning.

Q. And is that the last time you saw him?

A. Conscious. He just continued to fade away.

Q. And he died in that hotel room?

A. Within a period of half an hour, yes, sir.

Q. Just one more question: The business discussion which you described, which took place on the evening of October 11 and the early morning of October 12; was that a (89) temperate discussion or a heated discussion, if you recall?

A. There was one condition where Mr. Stopper became quite excited, yes, sir.

Q. How long did that discussion last?

A. I was not present, but I heard the reperenssions.

* * *

Cross Examination

By Mr. Rhoads:

Q. Mr. Miller, while you were in the bedroom with Mr. Stopper just prior to his death, did you see him take pills from under his tongue?

A. No, sir, he was in no position to do that. No, I didn't see him. However,—

Q. What were you going to say, however what?

A. However, he did have pills. I administered them.

Q. He had pills there with him?

A. Yes, sir.

Q. Had you ever seen him take pills during May and June of 1951?

A. No, sir.

* * *

(90) LESTER U. WEAVER, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McNally:

Q. Mr. Weaver, what is your address?

A. My business address?

Q. Your home address.

A. South Lawrence Road, Broomall, Pennsylvania.

Q. What is your business address?

A. Now, 3 Penn Center Plaza.

Q. What is your business or profession, Mr. Weaver?

A. I am an insurance broker, life insurance and accident and health.

Q. Are you connected with any particular company in that capacity?

A. Well, I am an agent of the New York Life, but in the nature of my business I use a lot of companies.

Q. Did you know the decedent in this case, Eugene A. Stopper?

A. Well, I got to know him about ten or fifteen years before his death. He had insurance with the New York Life.

Q. Did you see Mr. Stopper during the year 1951?

A. I did.

Q. What was your business relationship with him at (91) that time, if any?

A. He had sent for me to discuss life insurance.

Q. What was your job in connection with that?

A. Well, he gave me an order for a lot of life insurance for business purposes.

Q. How much was that order, do you know?

A. Well, to the best of my recollection it was $150,000.

Q. Did you then attempt to place some of that insurance with different companies?

A. Well, I had to. The man was 66 years old.

Q. With what companies did you place the insurance?

A. I placed $25,000 with the Dominion Life, I placed $40,000 with the Manhattan Life, and for a moment I have forgotten the other, but I had to go very slowly because of the age of the man and because many companies at that age don't accept any insurance.

Q. Will you describe your procedure in placing that insurance?

A. Well, it was necessary, with a man of that age, to take one case at a time. No company would give that amount of insurance. So I tried the Dominion Life first, because I knew the Canadian companies are more liberal at the older ages.

Q. Did you succeed in getting a policy with that company?

(92) A. I did.

Q. Did you try the Pan-American Life Insurance Company?

A. I did.

Q. I show you Defendant's Exhibit 1, which is the Part I of the application to Pan-American, and ask you if you recognize the signatures on that document.

A. I knew the signature of Mr. Stopper well.

Q. And whose signature is the other one there?

A. That is mine.

Q. Now, I notice that his name and your name are signed in a light blue ink. Do you know with whose fountain pen that was signed?

A. Well, it is very often a practice that when you are with a man he just doesn't have his pen right away, and I might have—I have forgotten—given him my pen to sign his application with.

Q. I notice that your signature and his are in the same color and are different from the other fillings-in on the policy; is that correct?

A. That is correct.

Q. Do you recall of your own knowledge where this application, which you witnessed, was signed?

A. Well, to the best of my knowledge and remembrance, it was signed on the third floor of his home on (93) Spruce Street, where he had an office.

Q. What was your practice with reference to other applications? Did you have him sign any of them in blank?

Mr. Rhoads: I object to that.

The Court: I will overrule the objection.

A. I never had a man—I have had applications signed in blank, but I never had any signed unless a company who had seen the papers of the Dominion Life said that they might consider it. This man was busy. I am busy too once in a while. It was hard for me to see him. He was interested in getting the insurance for his partners, and I probably at that time got the application signed in blank, because this particula. company we are talking about had seen the papers of the Dominion Life.

Mr. McNally: I would like these papers marked for identification as Plaintiff's Exhibit 7 and 8.

(Document headed "Application Part I, Philadelphia Life Insurance Company," was marked Exhibit P-7 for identification.)

(Document headed "Part I—Application to the New England Mutual Life Insurance Company," was marked Exhibit P-8 for identification.)

Q. I show you a paper marked Plaintiff's Exhibit 8 and ask you what that paper is.

(94) A. This paper is an application to the New England Mutual.

Q. Is the application filled in or is it in blank?

A. It is blank.

Q. Is there a signature on that application?

A. It is the signature of Mr. Stopper and myself as a witness. This might have been a duplicate that I had signed, because I got insurance for this man from this company.

Q. But it is a policy which is signed in blank?

A. That's right.

Q. I show you another one which is in full, Plaintiff's Exhibit 7, and ask you what that is.

A. What is the question again, what it is?

Q. I ask you what that paper is.

A. It is an application to the Philadelphia Life. It is signed by Mr. Stopper and witnessed by me.

Q. Where was that paper? Was it in your files or where was it?

A. This was in my files, because, well, nothing ever happened in that case.

Q. Is that in blank or is some of it filled in?

A. That is filled in. The application part is filled in.

Q. And again on both these exhibits in what color ink is your signature?

A. Well, this is different than the other, because I (95) suppose Mr. Stopper had his own pen at the time. Mine is in blue and his are in black, I would say.

Q. I show you a paper marked Plaintiff's Exhibit 4 for identification and ask you if you know what that is.

A. I do.

Q. And that is a letter dated what date?

A. June 18, 1951.

Q. And it is addressed to whom?

A. It is addressed to me.

Q. Will you read the letter, please.

A. "Dear Mr. Weaver:

"We are in receipt of a letter from Dr. Souchon, Medical Director, stating the above case was submitted for reinsurance and we have received an offer of Table A, subject to an EKG with multiple precordial leads and also a heart X-ray.

"The EKG and X-ray may be made by Dr. William A. Shannon, Room 1701, 1500 Walnut Street, Phila. 2, Pa.

"I have talked with Dr. Shannon and you may advise Mr. Stopper any morning, with the exception of Tuesday, will be agreeable to him. Dr. Shannon suggests 10:30 A. M. as the most suitable time.

"Cordially yours,
"Doc Willing
"Brokerage Manager."

(96) Q. In this case did you then communicate with Mr. Stopper in reference to this letter?

A. As I recall it, I did not . . .

* * *

Q. Did Mr. Stopper discuss with you whether or not he had received telephone calls from anyone in the Pan-American Life Insurance Company in reference to this request?

* * *

A. He did not.

* * *

FOUNDED 1850

PART I of Application for Insurance to THE MANHATTAN LIFE INSURANCE COMPANY of New York

OWNERSHIP FORM

1. (a) What is your name in full? (Please Print)
Mr. Eugene A. Stopper
Mrs.
Miss

(b) By what other names have you been known?

2. Residence (St. and No.) 2112 Spruce Street — Period Yrs. Mos. 5 —
City Phila. (Include Postal District, if any) County Phila. State Pa.
Formerly lived at 1107 Larchmont Rd., Penfield, Delaware Co., Pa.

3. Business? (St. and No.) Rm. 408 Liberty Trust Bldg. — Period Yrs. Mos. 5 —
City Phila. (Include Postal District, if any) County Phila. State Pa.

4. (a) Occupation? (State duties in full) Architect
(b) Name of firm or employer? Gilboy, O'Malley & Stopper
(c) Any other occupation? None
(d) Former occupation? None
(e) Do you contemplate any change of occupation? (Give details) No

5. Citizen of? (Give Country) U.S.A.

6. Have you within 5 years piloted an airplane or taken flying lessons, or do you intend to do so? (Give details) No

7. (a) Has any life, accident, or health insurance company or association ever rejected your application for insurance or issued a policy on a different basis from that applied for? (Give details) No

(b) Is any application, or reinstatement, pending or contemplated in any other company? (Give details) No

8. Will any insurance be surrendered, reduced or lapsed in this or any other company if a policy is issued on this application? (Give details) No

9. Total insurance now carried?

Name of Company	Year	Amount Life Insurance	Amount Add'l Accidental Death Ins.
New York Life	1932 41	20,000	none
Dominion Life	1951	25,000	

10. (a) Place of Birth? City Stuttgart, Germany State
(b) Date of Birth 6/16/85 (c) Nearest birthday? Age last 66

11. Amount of Insurance desired? 20,000

12. Kind of Policy? O. L.
, with Disability Waiver of Premiums.
Add'l Death Ben. (Accidental Means)? No (Yes or No).

13. Premiums payable? ~~Annually, Semi-annually,~~ or Quarterly? (Strike out two)

14. Dividends shall be:
☐ Paid in cash,
☑ Applied to reduce premiums,
☐ Left to accumulate at interest, or
☐ Applied to purchase additional paid-up insurance?

15. The Policy hereby applied for will be owned and controlled exclusively by
Name JOHN P. O'MALLEY
Address 903 QUINCEY ST. SCRANT PA.
(Include Postal District, if any)
Business engaged in CONSULT. ENGR.
If a corporation date — and State — incorporated.
What is the reason for this insurance? BUS. PROT.
Unless otherwise directed in 19 below premium notices shall be mailed only to the Owner of the policy.

16. (a) Beneficiary in case of my death:
Name ESTATE OF OWNER Relationship
If then living, otherwise to the Owner of the Policy.

(b) The right to change the beneficiary shall be reserved to the Owner of the policy.

17. I do NOT desire the extension provided by the clause entitled "Right To Elect A Settlement Option May Be Extended One Year" available to any payee of policy proceeds payable in one sum.

18. I do desire the AUTOMATIC PREMIUM LOAN provision to be effective, subject to its terms and conditions, if contained in any policy issued upon this application.

19. State any special request regarding premium notice, method of settlement, etc.

20. Additions or Amendments (For use of Home Office only). SEND PREM. NOTICES TO MEARS BLDG. SCRANTON, PA.

IT IS UNDERSTOOD AND AGREED (1) That the above statements and answers are complete and true and shall together with this agreement and any further statements and answers in Part II hereof, constitute the application for and become part of any policy issued hereon; (2) That such policy shall be subject to the terms and conditions thereof and shall not take effect until it has been issued, delivered, accepted, and the first premium thereon paid, all while my health, habits and occupation are the same as described in this application; provided, however, that if at the time of signing Part I hereof the FIRST PREMIUM is paid and the attached conditional receipt, properly completed and executed, is delivered to me, then, subject to the provisions of said receipt, the insurance applied for shall take effect from the date hereof, provided this application is approved and accepted at the Home Office of the Company upon the plan, for the premium, and for the amount of insurance herein applied for; (3) That no disclosure to, statement to, or promise made by any agent, examiner or other person shall be considered made to or by the Company or binding upon it unless the same is in writing and submitted to the Company at its Home Office as part of this application; (4) That in case of evident error or omission in this application or in event the Company decides to offer me a rated up or modified policy, the Company may make appropriate amendments hereto, and my acceptance of the policy with a copy of this application and such amendments shall constitute my ratification thereof and consent thereto; provided, however, that if this application is made in New York, Michigan or any other state wherein consent in such manner is forbidden by law, then my signed amendment hereto must be delivered to the Company at its Home Office before this policy shall take effect.

THERE HAS BEEN PAID TO THE AGENT NAMED HEREUNDER $ on account of the first premium on the policy applied for, which sum shall be applied in accordance with the provisions of the Conditional Receipt, which has been detached herefrom, delivered to and accepted by me subject to the conditions thereof.

Dated at Philadelphia, Pa. the 16 day of July 1951

Soliciting Agent

M. Milton Sobel
General Agent

Form No. [illegible]

Signature of Applicant (Proposed Insured)

No 17173

This application is made at the instance and request of the undersigned prospective owner, who hereby ratifies the statements, answers, and agreements in Parts I and II hereof, and agrees to be bound thereby.

Prospective Owner

Excerpts from Plaintiff's Exhibit No. 1 103a

CONTINUATION OF APPLICATION TO

Part 2 THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK

APPLICANT'S STATEMENTS TO THE MEDICAL EXAMINER—STATEMENTS OF OR COMMENTS BY MEDICAL EXAMINER MUST BE RECORDED IN PART 3

1. What is your full name?	Eugene A. [illegible]
2. Single? Married? Widowed? or Divorced?	Married
3. Date of birth?	June 16 - 1885.
4. What occupations do you now follow and how long have you been engaged in each?	Architect
5. (a) How long have you lived in the state in which you now reside?	(a) Since 1912
(b) In which state did you previously reside?	(b) Germany.
6. Have you ever changed your occupation or place of residence on account of your health? Give details.	No
7. Do you intend to change your occupation or residence or to make a journey outside the United States or Canada? Give details.	No
8. Have you during the past year resided or been intimately associated with any person suffering from tuberculosis? If so, give particulars and precautions taken.	No
9. Have you ever received a pension from any source or applied for or been in receipt of any disability or compensation benefit? If yes, give particulars.	No
10. (a) Has Albumin, Sugar or Casts ever been found in your urine?	(a) No
(b) Have you ever taken Insulin treatment? If yes, state dates and for how long.	(b) No
(c) Have you ever been on a restricted diet?	(c) No
(d) Have you ever been found to have a high Blood Pressure?	(d) No
(e) Have you a Hernia or Rupture?	(e) No
11. (a) Do you now use intoxicating liquors?	(a) Occ. glass of wine
(b) To what extent?	(b)
(c) Have you ever used them to excess?	(c) No
12. Have you ever been X-Rayed or had an Electrocardiogram? If yes, state when, by whom made and explain purpose.	X-Rayed & E.C.G. this year
13. Have you ever been examined for or made application to any life, health or accident insurance company, or have you any application pending, on which a policy has not been issued, or issued on a different basis than that originally applied for?	No
14. When were you last examined for life insurance, either formally or informally?	Granted 3 months ago for Annuity
15. ARE YOU IN GOOD HEALTH?	Yes

16. Have you ever suffered from any ailment or disease of	"Yes" or "No"	Name of Each Ailment, Disease or Injury	No. of Attacks	Date	Duration	Severity	Results and if within five years Name and Address of every Physician consulted
(a) The Brain or Nervous System?	No						
(b) The Heart, Blood Vessels or Lungs?	No						
(c) The Stomach, Intestines, Liver, Gall Bladder or Rectum?	Yes	Acute gastro-enteritis and appendicitis.	1	1928	for treatment	Severe	Attended by Dr. Sam Pearson at Lafayette Hosp.
(d) The Genito-Urinary Organs, Kidney or Bladder?	No						
(e) The Skin, Bones, Glands, Eyes, Ears, Nose or Throat?	No						
17. (a) Have you ever had Rheumatism, Gout, Syphilis, or Diabetes?	No						
(b) Have you ever raised or spat blood?	No						
(c) Have you ever had an Accident, Injury, Occupational Disease or Surgical operation?	Yes	See 16 C.					
(d) Do you intend to undergo any surgical operation?	No						
18. Have you ever been an inmate of, or received treatment or cure at an asylum, hospital, or sanitarium?	Yes	See 16 C.					

19. What other Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below.)

Name and Address of Physician	Date	Reason	Duration	Results
Dr. Samuel Pearson 1830 Delaney St.	1928	Twice yearly to Dr. for examinations. Routine	1 Season	Physical

20. IMPORTANT: May the Company refer to above physicians? Yes

21. Family Record of the Applicant.

	LIVING		DEAD			
	Age	Health	Age at Death	Specific Cause of Death	Year of Death	How Long Sick
~~HUSBAND or~~ WIFE,	68	Fair				
FATHER,			52	Auto accident. Head trouble	1911	1 hour
MOTHER,			52	Heart trouble	1916	Several years
BROTHERS, No. living? 0			21	Killed in action	1916	Sudden
No. dead? 1						
SISTERS, No. living? 0						
No. dead? 0						

If half brothers or sisters, so specify

I have read the answers to the questions in Part 1 hereof and Part 2 hereof, before signing, and they have been correctly written as given by me, and are full, true and complete and there are no exceptions to any such answers other than stated herein.

Dated at [illegible] the 13 day of [illegible] 1931

WITNESS TO SIGNATURE [illegible]

[illegible] M.D.
Medical Examiner

[illegible]
Signature of Applicant

*Form No. 403-C - 12M - 12-30

Excerpts from Plaintiff's Exhibit No. 1 104a

FOUNDED 1850

PART I of Application for Insurance to THE MANHATTAN LIFE INSURANCE COMPANY of New York

OWNERSHIP FORM

1. (a) What is your name in full? (Please Print)
Mr. Eugene A. Stopper
Mrs.
Miss

(b) By what other names have you been known?

2. Residence (St. and No.) 2112 Spruce Street — Period Yrs. | Mos.
City Phila. County Phila. State Pa. — over 5
(Include Postal District, if any)
Formerly lived at 1107 Larchmont Rd., Penfield Pa. — 10 yrs.

3. Business? (St. and No.) Rm. 408 Liberty Trust Bldg. — Period Yrs. | Mos.
City Phila. County Phila. State Pa. — over 5
(Include Postal District, if any)

4. (a) Occupation? (State duties in full) Architect
(b) Name of firm or employer Gilboy, O'Malley, & Stopper
(c) Any other occupation? none
(d) Former occupation? none
(e) Do you contemplate any change of occupation? (Give details) No

5. Citizen of? (Give Country) U.S.A.

6. Have you within 5 years piloted an airplane or taken flying lessons, or do you intend to do so? (Give details) No

7. (a) Has any life, accident, or health insurance company or association ever rejected your application for insurance or issued a policy on a different basis from that applied for? (Give details)
No

(b) Is any application, or reinstatement, pending or contemplated in any other company? (Give details) No

8. Will any insurance be surrendered, reduced or lapsed in this or any other company if a policy is issued on this application? (Give details)
No

9. Total insurance now carried?

Name of Company	Year	Amount Life Insurance	Amount Add'l Accidental Death Ins.
New York Life	1932 Ll	20,000	none
Dominion Life	1951	25,000	

10. (a) Place of Birth? City Stuttgart, Germany
(b) Date of Birth 6/16/85 (c) Nearest birthday? Age last 66

11. Amount of Insurance desired? 20.000

12. Kind of Policy? O.L.
O.J.T.
with Disability Waiver of Premiums.
Add'l Death Ben. (Accidental Means)? No (Yes or No).

13. Premiums payable? ~~Annually, Semi-annually~~, or Quarterly? (Strike out two)

14. Dividends shall be:
☐ Paid in cash,
☑ Applied to reduce premiums,
☐ Left to accumulate at interest, or
☐ Applied to purchase additional paid-up insurance?

15. The Policy hereby applied for will be owned and controlled exclusively by
Name JOHN P. GILBOY JR.
Address CARBONDALE RD. WAVERLY (Include Postal District, if any) LACKAWANNA CO. PA.
Business engaged in CONSULT. ENGRS.
If a corporation date — and State — incorporated.
What is the reason for this insurance? BUS. PROTECTION
Unless otherwise directed in 19 below premium notices shall be mailed only to the Owner of the policy.

16. (a) Beneficiary in case of my death:
Name ESTATE OF OWNER Relationship
If then living, otherwise to the Owner of the Policy.

(b) The right to change the beneficiary shall be reserved to the Owner of the policy.

17. I do NOT desire the extension provided by the clause entitled "Right To Elect A Settlement Option May Be Extended One Year" available to any payee of policy proceeds payable in one sum.

18. I do desire the AUTOMATIC PREMIUM LOAN provision to be effective, subject to its terms and conditions, if contained in any policy issued upon this application.

19. State any special request regarding premium notice, method of settlement, etc.

20. Additions or Amendments (For use of Home Office only). SEND PREM. NOTICES TO MEARS BLDG. SCRANTON PA.

IT IS UNDERSTOOD AND AGREED (1) That the above statements and answers are complete and true and shall together with this agreement and any further statements and answers in Part II hereof, constitute the application for and become part of any policy issued hereon; (2) That such policy shall be subject to the terms and conditions thereof and shall not take effect until it has been issued, delivered, accepted, and the first premium thereon paid, all while my health, habits and occupation are the same as described in this application; provided, however, that if at the time of signing Part I hereof the FIRST PREMIUM is paid and the attached conditional receipt, properly completed and executed, is delivered to me, then, subject to the provisions of said receipt, the insurance applied for shall take effect from the date hereof, provided this application is approved and accepted at the Home Office of the Company upon the plan, for the premium, and for the amount of insurance herein applied for; (3) That no disclosure to, statement to, or promise made by any agent, examiner or other person shall be considered made to or by the Company or binding upon it unless the same is in writing and submitted to the Company at its Home Office as part of this application; (4) That in case of evident error or omission in this application or in event the Company decides to offer me a rated up or modified policy, the Company may make appropriate amendments hereto, and my acceptance of the policy with a copy of this application and such amendments shall constitute my ratification thereof and consent thereto; provided, however, that if this application is made in New York, Michigan or any other state wherein consent in such manner is forbidden by law, then my signed amendment hereto must be delivered to the Company at its Home Office before this policy shall take effect.

THERE HAS BEEN PAID TO THE AGENT NAMED HEREUNDER $ on account of the first premium on the policy applied for, which sum shall be applied in accordance with the provisions of the Conditional Receipt, which has been detached herefrom, delivered to and accepted by me subject to the conditions thereof.

Dated at Philadelphia, Pa. the 16 day of July 1951

Soliciting Agent

M. Milton Sobel
General Agent

Signature of Applicant (Proposed Insured)

No 17172

This application is made at the instance and request of the undersigned prospective owner, who hereby ratifies the statements, answers, and agreements in Parts I and II hereof, and agrees to be bound thereby.

Prospective Owner

Excerpts from Plaintiff's Exhibit No. 2 105a

CONTINUATION OF APPLICATION TO

Part 2 THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK

APPLICANT'S STATEMENTS TO THE MEDICAL EXAMINER—STATEMENTS OF OR COMMENTS BY MEDICAL EXAMINER MUST BE RECORDED IN PART 3

1. What is your full name?	Eugene A. [illegible]
2. Single? Married? Widowed? or Divorced?	Married
3. Date of Birth?	June 16-1885.
4. What occupations do you now follow and how long have you been engaged in each?	Architect
5. (a) How long have you lived in the state in which you now reside?	(a) Since 1912
(b) In which state did you previously reside?	(b) Germany.
6. Have you ever changed your occupation or place of residence on account of your health? Give details.	No
7. Do you intend to change your occupation or residence or to make a journey outside the United States or Canada? Give details.	No
8. Have you during the past year resided or been intimately associated with any person suffering from tuberculosis? If so, give particulars and precautions taken.	No
9. Have you ever received a pension from any source or applied for or been in receipt of any disability or compensation benefit? If yes, give particulars.	No
10. (a) Has Albumin, Sugar or Casts ever been found in your urine?	(a) No
(b) Have you ever taken Insulin treatment? If yes, state dates and for how long.	(b) No
(c) Have you ever been on a restricted diet?	(c) No
(d) Have you ever been found to have a high Blood Pressure?	(d) No
(e) Have you a Hernia or Rupture?	(e) No
11. (a) Do you now use intoxicating liquors?	(a) Occ. glass of beer
(b) To what extent?	(b)
(c) Have you ever used them to excess?	(c) No
12. Have you ever been X-Rayed or had an Electrocardiogram? If yes, state when, by whom made and explain purpose.	X-Rayed & E.C.G. this year
13. Have you ever been examined for or made application to any life, health or accident insurance company, or have you any application pending, on which a policy has not been issued, or issued on a different basis than that originally applied for?	No
14. When were you last examined for life insurance, either formally or informally?	Granted 3 months ago for Insurance
15. ARE YOU IN GOOD HEALTH?	Yes

16. Have you ever suffered from any ailment or disease of	"Yes" or "No"	Name of Each Ailment, Disease or Injury	No. of Attacks	Date	Duration	Severity	Results and if within five years Name and Address of every Physician consulted
(a) The Brain or Nervous System?	No						
(b) The Heart, Blood Vessels or Lungs?	No						
(c) The Stomach, Intestines, Liver, Gall Bladder or Rectum?	Yes	cut gastro-enterostomy 1928 for duodenal ulcer					Stony Lonely Hosp.
(d) The Genito-Urinary Organs, Kidney or Bladder?	No						
(e) The Skin, Bones, Glands, Eyes, Ears, Nose or Throat?	No						
17. (a) Have you ever had Rheumatism, Gout, Syphilis, or Diabetes?	No						
(b) Have you ever raised or spat blood?	No						
(c) Have you ever had an Accident, Injury, Occupational Disease or Surgical operation?	Yes	See 16 C.					
(d) Do you intend to undergo any surgical operation?	No						
18. Have you ever been an inmate of, or received treatment or cure at an asylum, hospital, or sanitarium?	Yes	See 16 C.					

19. What other Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below.)

Name and Address of Physician	Date	Reason	Duration	Results
Dr. Carol Larson 1530 Lexington Ave	1928	Treated yearly to Dr. examinations. Weakness	8 years	Improved

20. IMPORTANT: May the Company refer to above physicians? Yes

21. Family Record of the Applicant

	LIVING		DEAD			
	Age	Health	Age at Death	Specific Cause of Death	Year of Death	How Long Sick
~~HUSBAND or~~ WIFE	68 Years					
FATHER			52	Suppurative Appendicitis	1911	1 year
MOTHER			52	Diabetes	1916	Several years
BROTHERS. No. living? 0			41	Bullet wound	1916	Instantly
No. dead? 1						
SISTERS. No. living? 0						
No. dead? 1						

If half brothers or sisters, so specify

I have read the answers to the questions in Part 1 hereof and Part 2 hereof, before signing, and they have been correctly written as given by me, and are full, true and complete and there are no exceptions to any such answers other than stated herein.

Dated at [illegible] the 13 day of [illegible] 1931

WITNESS TO SIGNATURE [illegible]

[illegible] M.D.
Medical Examiner

[illegible]
Signature of Applicant

*Form No. 403-C - 12M

Excerpts from Plaintiff's Exhibit No. 2 106a

Dr. Pierson Defendant's Ex 1. 4/25/57 RTH DATE 2-15-51

NAME Stoppert, Mrs. E. A. (65) 4/16/85 ADDRESS 2112 Spruce St. Phila 3, Pa. PHONE Rit-3077 Wfin. R, 6-9497

REFERRED BY Mary Hanes ADDRESS

BLUE CROSS (check one) Yes No BLUE SHIELD Yes No Cert.# Gr. #

OTHER

If Minor--Parent or Guardian ADDRESS

DIAGNOSIS

Has been well other than occas pain in lumbo sacral area, The Cas+ 2 d. ago Casting only few seconds. Digestion in good Plane at present. Occas. bleeding of piles after cleaning rectum.=

R.E. Dr. 194½ T. 974 B.P. 140/85 Head E.E.N.T. N. Neck N. Lungs clear. Heart N. size reg. 72 No murmurs. Abd upper Rt scar as before. Tenderness mid epigast under upper pole of scar. No hernias. Genitalia N. Wall. Rectal External hemorrhoid & signs recent bleeding. Rectal + prostate Not done. Extremes. + Reflex N. Urine acid 1.023 Sug. 0 Alb. 0. Findings unchanged. Continue ulcer routine.

4/14/51 Upper G.I. by Meyer (L.H.) = Esophagus, Stomach + Duodenum + extero stomy + jejunum O.K. Emptying time O.K.

5-3-51: In Harrisburg 3 wks. ago walked about 4 blocks after eating heavy dessert of some apple cake + had abd gone feeling in epigast. dyspnea + sweating beginning sitting to rest a while before going to a meeting. This occurred once since after walking. And mildly several times unassociated & activity except that during these 3 wks. Things have been very busy + rather tense.
B.P. 155/90 Heart OK a.f. 76. No murmurs. Chest OK. E.C.G. shows. within N.

~~Name req: Tonsil for diff. throat examin.~~
Re ~~Chang~~: Phlemine adv. 10 mgs. p.c.

5/28/51 X ray of chest 5/26 = Dilatation + elongation of aorta
No cardiac enlargement. Conf. c Mr. Weaver + Mrs.
+ Cardiogram + X ray report given them.

6-11-51: Epigast + discomfort, then precordial pain, sense of choking and dull heaviness left arm come shortly after breakfast and 1-2 x last wk. at other times of day. Sounds like angina but + doesn't accompany exercise etc. B.P. 140/80 (Belched several x While here) To stop coffee in A.M. + to get Master 2 stat test at Resp.

6/14/51: 12 E.C.G. + Master 2 stat at L.H. shows slight S.T. dep in some of chest leads returning to N. in 6 mins. Has stopped coffee in A.M. + more comfortable. Has had small A.M. attack of short duration. Admits deviation in New project. Re-elect 1 wk. + ~~X~~ Ammophyllin if further symptoms.

6/21/51: Attack yesterday, shortly pt. lunch lasting about 2 hrs. Has ~~Ex~~ since. Feels some precordial discomf. today. B.P. 140/85 Ht. reg. 72. ~~X~~ Ammophyllin gr III t.i.d. Nitroglyc. gr 1/100 under tongue P.R.N.

6/11/51: In Cape May 10 d. + felt well. Took Nitro 4 x Returned Phila. yesterday + had attack This A.M. requiring Nitro. B.P. 140/85 Heart ~~modal~~. R same + check in 2 d. + consider Kehlen. Therapy.

7-13-51: Has been better but still aware of precordial discomf. B.P. 130/80 Ht. Physiologic. R Nitro. 1 p.r.n. Enkel 40 mgs. No. I Start 1 ht. + build to t.i.d. unless nausea.

Q. Do you know a Mr. Charles Hinkle?

A. I don't know the man personally. I know that he is manager, but it seems to me at that time he was new in this

Q. Manager of what company?

A. Pan-American.

Q. How many years have you been an insurance broker, Mr. Weaver?

A. Well, I have been in the insurance business since 1919, but I was employed by a successful agent until his death in 1932.

Q. From your experience in that profession can you testify what is the general practice with reference to seeking information like this? Is it a general practice for the agent of the company to communicate directly with the insured, or is it the usual practice to communicate with the agent who placed the policy?

Mr. Rhoads: I object to that.

The Court: I will overrule the objection.

You have reference to the request for an EKG and a heart x-ray?

Mr. McNally: Yes, sir.

* * *

The Witness: In my experience, I have never known a general agent to call the insured in a brokerage case or in most any other case either.

By Mr. McNally:

Q. During the course of your placing this insurance for Mr. Stopper, and more particularly during the month of July, 1951, what if anything did Mr. Stopper himself know of the status of these various applications?

* * *

A. In the first place, Mr. Stopper only was handed one or two papers, applications, at a time. He was a very busy man, and it was hard for me to see him. I am afraid he

knew only about this Manhattan, because I don't think I told him anything about the Pan-American. If I am allowed to say it, it took the Pan-American about three weeks even to work on the case, so, naturally, with the speed of getting this insurance, I paid no attention to it at that stage of the game.

Mr. McNally: I would like to mark these copies as Plaintiff's Exhibits 9 and 10, and I am simply going to ask him to identify them as letters he sent out.

(Copy of letter dated July 24, 1951, from Weaver to the Manhattan Life Insurance Company, was marked Exhibit P-9 for identification.)

(Copy of letter dated July 20, 1951, from Weaver
(99) to the Manhattan Life Insurance Company, was marked Exhibit P-10 for identification.)

By Mr. McNally:

Q. I show you Plaintiff's Exhibit 9 and ask you if you know what that is.

A. I do. It is where I wrote to the manager of the Manhattan Life, paid the premium on, I guess this was the $15,000 policy. Yes. The check was on Gilboy, O'Malley, and Stopper, dated the 20th of July, drawn to the order of Manhattan Life.

Q. And the letter marked Plaintiff's Exhibit 10 shows, what?

A. (Continuing) It was on a bank in Scranton.

This is July 20, again to Milton Sobel, enclosing a check of Gilboy, O'Malley, and Stopper, drawn to the Manhattan Life, for $669, covering the first quarterly premium on a policy for $25,000 on the ordinary life plan, check drawn to the Third National Bank of Scranton.

Q. Now, the policies with which we are concerned in this case total the same amount; is that correct?

A. Well, I didn't read it, but the policy numbers are there and they total $40,000.

Q. The original policies which you enclosed here are for $15,000 and $25,000. Was there a change made?

A. I have forgotten just why that was, but as I went on (100) prior to that time, to the best of my recollection, the insurance agreements hadn't been put up, so as I would get the policies I would get them to his estate. I knew they weren't at that time for the family because they were business policies.

Q. How often during the summer of 1951 did you see Mr. Stopper?

A. Well, this is to the best of my memory. As I said, he was hard to see, and I believe he was taking a little vacation or was away over the week ends to Cape May. I, of course, was busy too. I am in New York, as a rule, a couple of days a week, and I don't think, to get back to the question, that I would see him more than once every two weeks, because I had nothing to tell him during the July business.

Q. Do you know of your own knowledge and your records what information the Manhattan Life Insurance Company possessed with reference to Mr. Stopper's medical history when he signed those applications?

A. Well, as I said previously, and after we had gotten the Dominion Life, on account of the age of this man, we would either have photostats sent of the case from the issuing company or make up copies ourselves on the typewriter and send it to the company to see whether they would consider the case.

(101) Q. Do you know of your own knowledge whether the Manhattan Life Insurance Company had that information?

A. I don't see why they wouldn't. They had.

* * *

Cross-Examination

By Mr. Rhoads:

Q. Mr. Weaver, you said that you were an insurance broker?

A. I am.

Q. And you said that this was a brokerage case?

A. I did.

Q. Mr. Stopper came to you and asked you to place $150,000 of insurance for him if you could?

A. That is correct.

Q. Did you ever receive a policy on Mr. Stopper's life from the Pan-American Life?

A. I did not. I didn't complete their requirements.

Q. What were their requirements?

A. There is a letter on exhibit here. They wanted an EKG and an x-ray.

Q. Chest x-ray?

A. Right.

Q. And you never got those from Mr. Stopper?

A. I did not.

Q. Mr. Weaver, I show you Plaintiff's Exhibit 1, being (102) the original of the Manhattan Life Insurance Company policy No. 367,668, with a photostatic copy of the application attached. Does Part I bear your signature as witness to Mr. Stopper's signature?

A. It does.

Q. That is your signature?

A. It is.

Q. And that is Mr. Stopper's signature?

A. It is.

Q. And will you read the section immediately below that, which is in printing, stating, "It is understood and agreed . . ."

A. "It is understood and agreed that the above statements and answers are complete and true and shall, together with this agreement and any further statements and answers in Part II hereof, constitute the application for and become part of any policy issued hereon . . ."

Q. Would you say that Mr. Stopper signed that on the date there, July 16, 1951? That is the date it bears, isn't it?

A. That's right.

Q. Will you look at Part II.

A. Right.

Q. Is that Mr. Stopper's signature?

A. It is.

Q. What date does that bear?

(103) A. July 13.

Q. You didn't witness that, did you?

A. I am not a doctor.

Q. That was witnessed by the doctor?

A. Right.

Q. Were you present at that time?

A. I was not. No agents are in with doctors.

Q. Will you read the printed words just above Mr. Stopper's signature and just above the date July 13, 1951.

A. "I have read the answers to the questions in Part I hereof and Part II hereof, before signing, and they have been correctly written as given by me, and are full, true and complete and there are no exceptions to any such answers other than stated herein."

Q. Now I show you Plaintiff's Exhibit 2, being the original of contract of insurance No. 367,669, issued by the Manhattan Life Insurance Company, and I refer you to the photostatic copies of the application attached thereto and made a part thereof. Do they contain the same signatures?

A. The same as that policy, that's correct.

Q. Same dates?

A. That's correct.

Q. Same printed statements immediately above the signatures?

A. That's right.

* * *

(105) Q. Now, I believe you said, didn't you, that you had had photostatic copies of the Dominion Life application either photostated or typed?

A. That's correct.

Mr. Rhoads: I ask that these papers be marked for identification as a group.

(Group of documents pertaining to the Dominion Life Assurance Company was marked Exhibit D-11-A to D-11-E for identification.)

By Mr. Rhoads:

Q. Mr. Weaver, I show you papers which have been marked for identification D-11-A to E and ask you if you will look at those and tell me whether those are the papers you had photostated or typed and sent to someone at Manhattan as copies of the Dominion Life Assurance Company papers.

A. That is correct.

Mr. Rhoads: That is all. Thank you.

REDIRECT EXAMINATION

By Mr. McNally:

Q. I would like to ask just one question on that. Mr. Rhoads asked you whether these particular photostats were papers which you submitted. Now I ask you, is there any-
(106) thing on these to identify that they are the ones you submitted or could they be similar to ones you submitted?

A. Well, I answer that this way, whether it's right or not. These photostats were either made by the Dominion Life or made here in Philadelphia. There is no change in them that I see. I am particularly looking at the request for medical history. It is a common practice in cases of this kind to have photostats made, but in most cases they are made by the company and sent to the other company.

Mr. McNally: No further questions.

RECROSS-EXAMINATION

By Mr. Rhoads:

Q. In this case you said that you sent them?

A. Well, when I say the word "sent," I am not sure whether the company sent it or whether I had the photostats made. I am under the impression that they were made here.

Q. And D-11-D and D-11-C bear Mr. Stopper's signature, don't they?

A. That's correct. He had to give the Dominion authority to get information concerning his past history.

Q. And that was given to Dr. Pierson?

A. As far as I know, yes.

Q. And it was dated what date?

A. April 5, 1951.

(107) Q. And D-11-E bears Mr. Stopper's signature?

A. Yes, sir.

Q. And that is dated when?

A. 26th of March.

Q. 1951?

A. Right.

Q. And that is part of the application to the Dominion Life?

A. That's correct, because after they got the March 26 report, they asked for the other, which is a natural procedure.

* * *

(108) CONSTANCE A. STOPPER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McNally:

Q. Mrs. Stopper, I am going to keep you on the stand only a few minutes, but I want you to answer as loudly as you can.

Are you the widow of Eugene A. Stopper?

A. Yes.

Q. And are you the Constance Stopper who is the plaintiff or the one suing in this case?

A. Yes.

Q. Where did you live with your husband in 1951?

(109) A. 2112 Spruce.

Q. Did he have offices at that address also?

A. Yes.

Q. During the year 1951 what did you observe of your husband's business activities?

A. In that year he was very busy, busier than he had ever been before.

Q. Did he take on a different type of business that year?

A. Any extra business, you mean?

Q. I mean did he go into a new business arrangement that year, if you know?

A. Yes, yes.

Q. And what was that?

A. With Gilboy and O'Malley.

Q. During that year what did you observe about your husband's physical condition?

A. He worked harder than ever, and I think he was very good. He had a little less stomach distress.

Q. During that particular summer of 1951 where did you spend the summer?

A. We spent our summer in Cape May.

Q. Did Mr. Stopper come down to Cape May during that summer?

A. Yes, he came. He came every week end, almost (110) every week end.

Q. What did he do when he came down for the week ends? What activities did he engage in?

A. My grandchildren and my daughter were with me. He went with them to the beach.

Q. Did he go in the water?

A. I didn't go down, but he did.

Q. Do you know whether or not he himself went in bathing?

A. Yes.

Q. And during this period, more particularly during the months of June and July of 1951, did he make any complaints to you about his physical condition?

A. He never did.

Q. Did he discuss with you anything about his having heart trouble?

A. No.

Q. What medicines did you observe him to take during that period June and July of 1951?

A. Nothing different than what he did before. When he felt a pain in the stomach he took baking soda or a glass of hot milk. That always relieved him.

Q. That was for what purpose?

A. For stomach distress.

Q. During this particular summer did he discuss with (111) you his physical condition?

A. Say that again, please.

Q. During this summer of 1951 did your husband discuss with you his physical condition?

Mr. Rhoads: If Your Honor please, I am going to object to the conversations.

A. No.

Mr. McNally: Just a minute.

The Court: The answer is no, so there is no conversation to discuss.

By Mr. McNally:

Q. During the fall of 1951 where were you living during the months of September and October of 1951? Where were you living then?

A. We were in Cape May until the middle of September.

Q. And then where did you go?

A. We went home again to Spruce Street.

Q. What did you observe of your husband's working hours during the months of September and October, 1951?

A. He worked as usual, very late at night and very early in the morning.

Q. Did he work every day?

A. Every day.

Q. During this period of time, particularly in those (112) last months of September and October, to your knowledge, did he take any days off from work?

A. No. Once we went to Cape May to close the house up, and he took a day off for that.

Q. During this time, from any actions of your husband's or from any complaints that he had, did you know, or suspect that he had a heart condition?

A. No.

Q. During this particular period, in the month of May and June and the early part of July, did you know he was going to see Dr. Pierson at that time?

A. Yes, I think I did, but we went to the doctor regularly.

Q. Were you with your husband when he went to the doctor on certain of those occasions?

A. If I went to the doctor with him?

Q. Did you go with him during the months of May and June of 1951?

A. Sometimes I did, because that was the only time he could take me in the car. From there we probably took a little trip of an hour or two, but I didn't go to the doctor's office.

Q. You did not go to the doctor's office?

A. No.

Q. Where did the doctor see you?

A. The doctor saw me—you asked me now if I went (113) with my husband, and you want to know now if he went with me?

Q. No. When the doctor was treating you, where did the doctor see you?

A. He didn't see me then. I went another time.

Q. During the time he was in Cape May during the month of July, 1951, what medicines, if any, did you observe your husband take?

A. None not any.

MARGARET E. NEWPHER, having been duly sworn, was examined and testified as follows:

(114) DIRECT EXAMINATION

By Mr. McNally:

Q. Mrs. Newpher, where do you live?

A. I live in West Englewood, New Jersey. That is the northern part of New Jersey.

Q. What is your relationship to Mr. Stopper?

A. I am his daughter.

Q. Were you at Cape May during the summer of 1951?

A. Yes, I have gone to Cape May every year during the summer, part of the summer.

By The Court:

Q. What part of Cape May?

A. Windsor Avenue. I lived with my mother and father.

By Mr. McNally:

Q. If you can recall, during the summer of 1951, were you there during the month of July?

A. Yes. I usually would spend from four to six weeks in Cape May. I have three children, and we went down there after school closed and usually spent that time down there.

Q. While you were at Cape May during that period how often did you see your father?

A. Well, he would come down over the week ends, and I would see him at that time, and, well, that was just about the only time that I saw him during the summer.

(115) Q. When he came down over the week ends, in what activities did he engage?

A. Well, my father loved to bathe, and he enjoyed the children on the beach, so we used to go down to the beach every day, and I must say he was braver than I was, because he always went in the water with the children and swam around and really enjoyed himself.

Q. Did he do that every week end when he came down?

A. Yes.

Q. During that time, particularly during the month of July, 1951, did your father discuss with you or with other members of the family in your presence his state of health?

A. No, he didn't. My father never said anything about his health. I never thought there was anything to talk about. He never acted as though there was anything to say, and he seemed to be always very enthusiastic and full of plans for the future. I had no reason at all to think that he should talk about his health to me, because I didn't think there was anything the matter.

Q. What plans did he mention during that summer of 1951?

A. Well, he had formed this partnership, and he was full of enthusiasm about going to Europe and setting up his offices over there, and he had at that time intended to take my mother over, because she wasn't well and he thought (116) that she could take the rest cure while he went about his business, and those were the plans that he was discussing at the time, and, in fact, kept right on going until he passed away.

Q. During the time you observed him that summer in Cape May did he get sick at any time that you noticed?

• • •

A. No.

• • •

(117) Q. What medicines, if any, did you observe him to take during the summer of 1951 while you were there?

A. I didn't see him take any medicine.

Q. Did he have any heart attacks during that summer while you were there?

A. No.

• • •

CROSS-EXAMINATION

By Mr. Rhoads:

Q. How long had your father been in the architectural business?

A. Well, I couldn't say, because all my life he has been an architect.

Q. Do you know what his educational background was?
(118) A. No, I couldn't really tell you. He studied in Germany, and he came over here, and that was, of course, before I was born, and he has been in the architectural business all my life that I remember. He studied for that and that was his career.

Q. Do you know what institution he graduated from?

A. No, I couldn't say. My mother would be qualified to answer that, but I wouldn't be able to tell you.

* * *

Mr. McNally: If Your Honor please, the plaintiff has one more witness who will take about fifteen minutes at two o'clock.

The Court: Is that your last witness?

Mr. McNally: Yes, Your Honor, I am all finished.

The Court: Do you have any surrebuttal that you can think of at the moment?

Mr. McNally: Not that I can think of at the moment.

I have two, Your Honor. I forgotten one other witness.

The Court: You have two. Who are they?

Mr. McNally: One is Mr. Teller, of the Dominion
(119) Company, and one is Miss Ottinger, the personal secretary of Mr. Stopper.

The Court: Well, I would like to have speeches concluded this afternoon.

Mr. McNally: They will be.

The Court: And I am not going to charge today, but I also want, at the opening of the afternoon session, any requests that you may have for charge.

Mr. McNally: Yes, Your Honor.

Mr. Rhoads: Could we see Your Honor at side bar for a minute?

(The following took place at side bar.)

Mr. Rhoads: If Your Honor pleases, in connection with the two witnesses Mr. McNally just mentioned, Mr. Teller and Miss Ottinger, I just want to be certain that I am protected on the record with an offer of proof as to those.

The Court: You have already had it.

Mr. Rhoads: I just want to be certain. Is Mr. Teller also included in the group you mentioned, Mr. McNally?

The Court: No.

Mr. Rhoads: All right, then, I am covered as to Miss Ottinger.

(120) Mr. McNally: I called upon you for the original of the letter from Ackerman to Sobel.

Mr. Rhoads: I told you, Mr. McNally, I did not have that letter, but I have a carbon copy in my possession.

Mr. McNally: Even though the Dominion issue is out of the case, nevertheless I think we are entitled to show a letter from Manhattan back to Dominion the day before the policy was issued, saying, "We have examined the whole Dominion file. We have come to the conclusion that we can issue this policy on a simple office examination and specimen and go right ahead with the exam," and the exam was made the next day, showing that the actual reliance in the case was on the facts discovered in the Dominion policy.

Mr. Rhoads: To whom was that letter written?

Mr. McNally: That letter was written from Ackerman, your head man in New York, to Milton Sobel, your general agent.

Mr. Rhoads: May I ask what place that has in connection with this offer of the testimony from Mr. Teller?

The Court: It is about that letter that he is trying to get. That is what it is about, isn't it?

(121) Mr. McNally: Oh, then, there is the other letter. There is one more letter to identify, to Stopper from Teller. The letter states this—we have to get them identified—

Mr. Rhoads: Let's see the letter.

The Court: Let us not have any guesswerk about it.

Mr. McNally: A letter written to Mr. Stopper from Teller which we would say would put Mr. Stopper in a frame of mind indicating he was in very good health, as far as knowledge of Stopper was concerned.

The Court: What bearing does that have?

Mr. McNally: It indicates Stopper's frame of mind, more than anything else. He has passed a wonderful exam. He knows he is in good health.

The Court: Well, that is the one that you want to identify?

Mr. Rhoads: If Your Honor please, I will object to that letter of any witness being called for the purpose of identifying that letter and offering it into evidence. It has no place in this case.

The Court: I am inclined to think that that is so. It is three months before.

Mr. Rhoads: And it is between the local manager
(122) of the Dominion Life and Stopper. We are no parties to that letter.

Mr. McNally: You have put in a lot of letters to which we are no party, between Mr. Stopper and Pan-American.

The Court: I am inclined to agree with Mr. Rhoads at the moment, but if you want to get your offer in, you may do so, and I will rule at that time. I fail to see the relevancy of it at the moment, but I may change my mind on reflection.

Mr. McNally: We don't need any more witnesses.

The Court: You make up your mind as to what you are going to do in the nature of witnesses, but let us get along.

Mr. Rhoads: Mr. McNally, I am not clear at the present time if you are going to call Mr. Teller. I don't yet have an offer of proof from you.

The Court: I understood it was as to that letter.

Mr. McNally: That is out. Now there is the other point. I want to put into the record all the material that Manhattan received from Dominion before issuing the policy, to show all the things they knew about Stopper before the issuance of the policy. Now, on that
(123) offer you can rule, and if it is turned down, it is one thing. If it is questioned, then Mr. Rhoads has here the papers. We won't need to call witnesses just to put those papers in.

The Court: I think this is coming to a question of evidence as presented. I will pass on it as it happens. I am not going to make any pronouncement as to any situation like that at this time.

We will recess until 2 o'clock. Be back in your seats at 2 in this courtroom, members of the jury.

(Recess taken at 12:30 P. M. until 2:00 P. M.)

(124) AFTERNOON SESSION

Present: Counsel as before noted.

CHARLES F. TELLER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McNally:

Q. Mr. Teller, where do you live?

A. Alden Park Manor.

Q. What is your occupation?

A. General manager of the Dominion Life Assurance Company of Waterloo, Ontario, Canada, for the Philadelphia area.

Q. Where are the offices of your company?

A. Waterloo, Ontario, Canada.

Q. Where are the Philadelphia offices?

A. 1411 Walnut Street.

Q. Did your company assure the life of Eugene A. Stopper?

A. Yes.

Q. And in the course of that did you have a file of your records consisting of the medical history and other data on which you based your application?

A. Yes, on which the company based their—

Q. The company based the issuance of application. (125) Was a request made by the Manhattan Life Insurance Company for such information, or whatever information you had? Was a request made by the Manhattan Life Insurance Company for whatever information you had on that subject?

A. I delivered that to Mr. Sobel, their general agent.

By The Court:

Q. You delivered what to Mr. Sobel, general agent?

A. The application, the medical examinations made by Dr. Stadler, photostats of them, and medical history from a Dr. Pierson.

Mr. McNally: Will you mark this letter P-11, Mr. Reporter.

(Letter dated April 10, 1951, from Charles F. Teller to Mr. Eugene A. Stopper, was marked Exhibit P-11 for identification.)

By Mr. McNally:

Q. Can you identify the signature to that letter?

A. Yes.

Mr. McNally: If Your Honor please, this is the letter which I offer to show—

Mr. Rhoads: Just a minute. Any offer of proof in connection with that I ask be at side bar, if Your Honor please.

The Court: Let me see the letter.

(126) (Letter handed to the Court.)

Mr. McNally: May I state for the record the offer of proof and have you rule on it for the record?

The Court: All right. I guess you better make it at side bar.

(The following took place at side bar;)

Mr. McNally: This letter marked for identification as Plaintiff's Exhibit 11 is offered to show receipt of information from the Dominion Life Assurance Company to Mr. Stopper in relation to his health and is offered for the purpose of showing Mr. Stopper's basis for belief in his good health at this time.

Mr. Rhoads: If Your Honor pleases, I would object to any questions being asked about this letter or

the letter being received in evidence in this case, it being a letter dated April 10, 1951, from Charles Teller, who is manager of the Dominion Life Assurance Company, addressed to Mr. Stopper, and in no way material or relevant or admissible in this suit between this plaintiff and Manhattan Life. Further on the issues in this case there is no issue of good health.

The Court: There isn't?

Mr. Rhoads: There is not, on the evidence in this case. That was the reason for my objection to many of
(127) the witnesses called in rebuttal here. Stopper's opinion as to his condition of health, whether it was good, is not at issue in this case as the case has developed up to this point.

The Court: All right. I will reject the offer as being too remote from the date.

Mr. McNally: Grant me an exception.

Thank you, sir.

(End of discussion at side bar.)

Mr. McNally: No further questions.

By The Court:

Q. Have you any record of when that was transmitted to the Manhattan?

A. No, sir. I gave the photostats to Mr. Sobel, including the EKG. I couldn't give him the x-ray because that is at the home office, but I gave him the complete files of our case that we submitted to our home office.

Q. Including an x-ray report?

A. No, I didn't have the x-ray report.

Q. But you gave him the original EKG?

A. No, I gave him a photostat of it.

Q. A photostat of it?

A. Because the original was at the home office.

Q. You have no way of knowing when that was submitted?

(128) A. Our policy was issued April 27.

Q. We know it was subsequent to that.

A. After that.

Q. I am trying to fix a date in June or July.

A. I would say it would probably be the latter part of June or the first of July.

Q. All right.

A. It was just routine, so far as we are concerned.

By Mr. McNally:

Q. Mr. Teller, can you refer to your file and show when you got the records back from Manhattan Life Insurance Company? I think there is one letter there.

(The witness handed a paper to Mr. McNally.)

Mr. McNally: Mark this P-12, Mr. Reporter.

(Letter dated July 13, 1951, from M. Milton Sobel to Mr. Charles F. Teller was marked Exhibit P-12 for identification.)

By Mr. McNally:

Q. I show you a document marked Plaintiff's Exhibit 12 and ask you if you can identify the signature on that letter.

A. Yes.

Q. And the signature is by whom?

A. Mr. Milton Sobel.

Q. And the letter is dated what date?

(129) A. July 13, 1951.

Q. And what does the letter say?

A. Do you want me to read it?

Q. Yes, please.

A. "Dear Charlie:

"I am returning herewith photostats with which you furnished me in the above matter.

"I am also attaching a copy of a letter received this date from our Chief Underwriter.

"With kind regards, I remain."

Mr. McNally: Thank you. No further questions.

CROSS-EXAMINATION

By Mr. Rhoads:

Q. Mr. Teller, where is the copy of the letter from Manhattan's chief underwriter?

A. I beg your pardon?

Mr. Rhoads: Mr. McNally, where is the copy of the letter from Manhattan's chief underwriter referred to?

(Mr. McNally handed a paper to Mr. Rhoads.)

Mr. Rhoads: May I have that marked, please.

(Copy of letter dated July 12, 1951, from Samuel H. Ackerman, Chief Underwriter and First Assistant Secretary, the Manhattan Life Insurance Company, to Mr. M. Milton Sobel, General Agent, was marked Ex-
(130) hibit D-12 for identification.)

By Mr. Rhoads:

Q. Mr. Teller, does your file show the exact date that the Dominion policy issued?

A. Yes, sir.

Q. Could you tell me exactly when it issued?

A. Here is a photostat of the card.

Q. Can you from that card—

A. April 27.

Q. April 27, 1951?

A. That's right.

Q. So that all of the information on which your policy issued had been obtained from the applicant prior to that date?

A. Yes.

Q. Now, you testified that you submitted photostats to the Manhattan?

A. Yes.

Q. I show you papers which were earlier marked for identification Defendant's Exhibits D-11A, B, C, and so

forth, and ask you if those are the photostats and the copy of an application which you submitted.

A. Yes, sir, together with an EKG.

Q. Together with an EKG?

(131) A. Yes, sir. There is the photostat of the EKG, and here is a memorandum I find in the files that the girl put in there about the EKG.

Q. That wasn't submitted, was it? That is dated February 7, 1952.

A. I don't know. I find that in my file. I don't know.

Q. From its date can't you say whether or not it was submitted. It is February 7, 1952.

A. If it is not in that file, it is not submitted.

Q. This is the material which you submitted, with the exception of this EKG?

A. Yes.

The Court: With the exception of it?

Mr. Rhoads: This material (indicating). He says, in addition, this EKG was submitted, which isn't in this file, and this EKG is dated May 3, 1951.

The Witness: Yes.

Mr. Rhoads: May I ask that that be marked for identification.

(Photostatic copy of electrocardiogram was marked Exhibit D-13 for identification.)

The Witness: That is dated after the issuance of the policy, but there was an EKG and x-ray submitted to the company.

(132) By Mr. Rhoads:

Q. This one being dated after the issue of your policy, you don't know whether this was the one submitted or not?

A. No, I do not.

Q. The EKG which you submitted would have been a photostat of an EKG submitted to you prior to the issuance of your policy, wouldn't it?

A. On a case of this age there would be an EKG and x-ray submitted to the company.

Q. And one prior to the issuance of your policy?

A. Yes, sir.

Mr. Rhoads: That is all. Thank you.

Mr. McNally: If Your Honor please, on these photostats we have agreed that Mr. Rhoads has in his possession those photostats and this material, all of which were submitted to them, and I have agreed that that is all that was submitted to them by Dominion Life, and that they may be offered in evidence, including the letter of July 12, 1951, which we will have to mark for identification, in which the chief underwriter of the Manhattan Life Insurance Company returned the photostats of the Dominion Life papers to Milton Sobel, general agent, and I will mark that for identification as Plaintiff's No. —

(133) Mr. Rhoads: If you want to mark them so it is complete, mark them under the D-11 number. That would be D-11-F.

(Copy of letter dated July 12, 1951, from the Chief Underwriter of The Manhattan Life Insurance Company, to Mr. M. Milton Sobel, General Agent, was marked Exhibit D-11-F and received in evidence.)

(Letter dated July 12, 1951, from M. Milton Sobel, to Mr. Samuel Ackerman, Chief Underwriter, was marked Exhibit D-11-G and received in evidence.)

(Copy of letter dated July 13, 1951, from G. Holbrook Barber, M.D., Medical Director, to The Dominion Life Assurance Company, was marked Exhibit D-11-H for identification.)

(Letter dated July 19, 1951, from A. J. McGanity, M.D., Medical Referee, The Dominion Life Assurance Company, to Dr. G. Holbrook Barber, Medical Direc-

tor, The Manhattan Life Insurance Company, was marked Exhibit D-11-I and received in evidence.)

Mr. McNally: Now, with the offering of those papers in evidence, and the offer in evidence of the plaintiff's exhibits which I have marked for identification 7 to 12—

The Court: That may not include any that I have
(134) ruled on adversely.

Mr. McNally: No, it won't include any that you have ruled on adversely.

The Court: You said you have offered all the papers which have been marked for identification.

Mr. Rhoads: I would like to look at them if I may, Your Honor. It is my understanding, then, that D-11 and its various numbered parts is now being offered as a plaintiff's exhibit?

Mr. McNally: Yes.

One which was adversely ruled on was P-11, and that is not being offered.

Plaintiff's Exhibit No. 1 has been offered in evidence.

The Court: P-1 to P-5 have been previously admitted.

Mr. McNally: Plaintiff's Exhibit 6 is the partnership agreement.

Mr. Rhoads: If Your Honor please, I renew my objection to that.

The Court: I thought we went over that this morning. Weren't you up at side bar here this morning?

Mr. McNally: You did, Your Honor, on P-6 you ruled that it would be admitted.

(135) (Exhibit P-6 admitted in evidence.)

Mr. McNally: P-7 is the application of Philadelphia Life.

Mr. Rhoads: If Your Honor please, I object to that. That is an application dated August 17, 1951, after the date of the issues here and not at all material.

Mr. McNally: It was offered for the purpose of showing the practice of the general agent, Mr. Weaver, of having signed applications around the office, and for that purpose I am offering P-7 and P-8.

Mr. Rhoads: I object to both of them on the grounds that they are not material.

The Court: I will sustain the objections to them. He has testified. The jury has heard the testimony, and I don't think we need that documentary evidence to support it.

(Exhibits P-7 and P-8 excluded.)

Mr. McNally: Plaintiff's Exhibits P-9 and 10 are being offered, which are simply the—

Mr. Rhoads: If Your Honor please, I object to those. They go to no issue in this case. We admitted payment of premiums. As Your Honor knows, we tendered return of premiums and still stand ready and willing to pay them.

The Court: Well, I don't think that that is impor-
(136) tant in the case. Mr. Weaver testified that these are just covering letters for the checks for moneys which the company admits receiving.

Mr. Rhoads: That is right.

The Court: Which put these policies in effect at the time, so I don't see any need for this. I will sustain the objection.

(Exhibits P-9 and P-10 excluded.)

Mr. McNally: Your Honor has already sustained the defendant's objection to P-11, and the last exhibit I have to offer is P-12.

Mr. Rhoads: I have no objection to P-12.

(Exhibit P-12 admitted in evidence.)

Mr. McNally: Do we need to change the numbers on these that have been marked D-11?

The Court: They can stand as D-11. They are being offered, however, by the plaintiff as his exhibit.

Mr. McNally: That is the plaintiff's case, Your Honor, on rebuttal.

Mr. Rhoads: If Your Honor pleases, I renew my motion under Rule 50, and that completes the case.

The Court: I will deny your motion for judgment under Rule 50.

* * *

(139) **CHARGE OF THE COURT.**

CLARY, *J.*:

Members of the jury, you have listened to all the evidence in this case, you have listened to arguments of counsel on the evidence presented here, and it now becomes my duty to charge you as to the law of this particular case. As I have said to some of you before, you and I play very important but very distinct parts in the trial of any lawsuit. It is your duty to determine what the real facts of any particular case are. You and you alone make that determination. The Court has nothing to do with your determination as to the facts, and in that connection may I say that if counsel or the Court refers to any particular bit of testimony in any way that differs from your recollection of that testimony, you are to disregard our recollection and substitute your own. As to the law of the case, it is the Court's function and duty to tell you what principles of law to apply to the facts as you find them. It is not the jury's province to determine either what the law is or should be. It is your duty to take the law of the case as it is given to you by the Court.

This is a case based on two insurance contracts which you will take out with you when you go out to deliberate on this case in the jury room. An insurance contract provides (140) that upon the death of the individual insured, the insurance company, provided premiums are paid up to the date of death, will pay the face value of the policy to the beneficiaries named in the policy. That insurance contract is based on two considerations: first, payment of premium, of course, and, second, it is issued on the basis of certain statements contained in applications, and those statements contained in applications are representations by the insured to the insurance company as an inducement to it to issue the policy.

An insurance contract is the kind of contract in which there should be demonstrated good faith, particularly on the part of the insured, and it is his duty not to make any misrepresentations to the company in a matter material to the risk that the company assumes, and the company has the right to rely upon the representations made in the application.

You have seen a somewhat different system of proof in this case than you ordinarily have seen in the other contract and negligence cases which have been presented to you during your term of service, because in order to establish a prima facie case, all that the plaintiff has to do is to establish, first, the fact that the contract was made, the issuance of the policy, and, second, that all premiums have (141) been paid on that policy up to the date of death. The ordinary procedure then is to file proof of claim, and the insurance company will pay the face amount of the policy. Therefore, that is the only burden that the plaintiff has, in the first instance, to establish his right of recovery.

If the insurance company says that they are not liable on the particular contract or contracts of insurance, then the burden of going forward and the burden of proof rests on the insurance company, the defendant, to satisfy you by a fair preponderance of the evidence of the truth of the defenses which they have raised to the payment of the policy. It is not the plaintiff's burden in this case to satisfy you by a fair preponderance of the evidence; the burden is on the defendant, the insurance company. It is their obligation to satisfy you by testimony that they are correct when they say in this case that there were false representations, that the insured knew they were false in the sense that I will tell you about in just a few minutes.

What is a preponderance of the evidence? It has been variously defined as the amount of evidence or quantum of evidence which more clearly points to a definite result, or it may be rather defined by an illustration: You put the evidence of the defendant on one side, the evidence of the

(142) plaintiff on the other. It is the burden of the defendant to have that evidence weigh a little more heavily on his side. If the scales are balanced, the defendant has not met its burden.

I have said to you that the burden shifts to the insurance company to prove to you that the representations were false, that the insured, the deceased, Mr. Stopper, knew that they were false when he made them or that he otherwise acted in bad faith in making these representations.

What does the evidence show? It is the duty of the Court in the first instance to determine whether or not there is any controversy which the jury can pass upon. There are cases where it becomes the duty of the Court to take away from the jury the decision in the case. Just for illustration, had the application in this case said that the deceased, Eugene Stopper, had never been treated within five years by any doctor, that he had never had an electrocardiogram taken, and it was proved by documentary evidence that those statements were false, those statements would be material to the risk, and the Court would not be in a position to permit the jury to pass upon it, but the Court would have to determine as a matter of law that the misrepresentation had been established and that there was nothing for the jury to pass (143) upon, but that is not the situation, in the view of the Court, in this particular case.

The defendant contends in this case, first of all, that the insured had heart trouble, knew he had heart trouble, did not so state to the insurance company, and that therefore there was a material misrepresentation in the application which should avoid the policy. I will say to you that the fact that a person had heart trouble and knew he had heart trouble and concealed it from the insurance company would be a complete defense to this case and your verdict, if you find that to be the fact, should be in favor of the defendant in no sum of money.

Another contention of the defendant in this case is that the insured had certain treatments from a doctor of which

he did not inform the insurance company, that that itself is a material misrepresentation because he failed to answer the questions fully, and it reacted to the prejudice of the insurance company, and since there was a material misrepresentation the policy therefore should be void and the defendant should not have to pay.

The third contention, as I understand it, is that he concealed from the insurance company the fact that he had pending an application for insurance with Pan-American, (144) that the documentary evidence establishes that, and therefore that is a material misrepresentation.

I have told you in the first instance that if Eugene Stopper, the deceased, knew he had heart trouble and deliberately concealed it in bad faith from the insurance company, that is the end of the case and you should return a verdict in favor of the defendant. However, evidence has been introduced here, and this is the gray field—there is a dispute here and I am submitting it to you—as to whether Eugene Stopper ever knew he had a heart condition. You have heard all the testimony in the case. So far as my recollection is concerned, and my recollection does not govern—I am leaving it entirely to you—the doctor himself never told Eugene Stopper that he had a heart condition; and I may say to you that even if he actually had a heart condition and did not know it, he can't be guilty of any fraud on the insurance company in not disclosing it, because you cannot disclose what you do not know; and even though the doctor may have had suspicion or certain knowledge that he did have it, that knowledge of the doctor, untransmitted to Stopper, cannot be used as a basis of a finding that Stopper knew about it. It is for your determination whether or not there was any fraud or misrepresentation when Stopper told the insurance company that he never had a heart condition.

(145) I permitted certain testimony in this case as to the activities of Stopper. I did not admit that to prove good health. I admitted that testimony only for your considera-

tion in determining the state of mind of Mr. Stopper at the time he made this application. His conduct at that time may have a bearing on the matter. The importance of it is for you to determine the question of good faith and whether or not he had any knowledge that he had a heart condition. If he did not know it, and the evidence convinces you of that fact, then in failing to disclose it to the insurance company he cannot be guilty of any misrepresentation or fraud, and therefore that element would drop out of this case.

The second point which I presented to you refers to the failure to disclose to the insurance company these May and June visits. I want you to look carefully at the statements made in the photostatic copies of the applications which will be before you, Plaintiffs' Exhibits 1 and 2. I am leaving entirely to you the question as to whether the form of the question on that application is such as would require specific dates to be given or whether it would impress a layman, reading it over, that he was under a duty to give that doctor that asked the questions—and understand the questions (146) were asked by the insurance company's doctor—specific dates as to treatment.

The law of Pennsylvania, under which this case is being tried, does not hold it to be a fraud on an insurance company if an insured fails to disclose every visit to a doctor, if, in the opinion of the person, the patient and the insured, it was for some trivial matter; and in that connection I think that the cases have said headaches, indigestion, or minor illnesses.

I am going to leave it to you as to whether or not that answer is a reasonable answer under all of the circumstances. Certainly he disclosed the name of his doctor. Certainly he said flatly that he had had no illnesses. Now, in lay language, what does that mean? I am leaving that entirely to you. Does that mean every visit to the doctor is an illness, or may a lay person consider that unless you are confined to bed you are not ill? I don't know. That is one of the many questions involved, but if you feel that he made no

conscious misrepresentation in the information he gave that doctor, then you might as well determine that that point also falls out of the case. If, however, with intent to defraud the insurance company, he made certain answers and gave certain information, then it would be a material (147) matter in connection with the contract and you in that case could conclude that the insurance company is right and that the plaintiff in this case is not allowed to recover. You see, I come back every time to the question of fraud and conscious misrepresentation. That is the big point in this case and that is for you to determine.

Now, you had the information of the doctor, the fact of the man coming there once a year or twice a year, whatever it was, for regular physical checkups. Were some of these visits in connection with that or weren't they? Those are questions for you to consider in the matter of the over-all picture of the case.

Finally, we come to the question of the Pan-American application, and that is another issue that is in the gray field, and I am going to leave that question to you also for determination, as to whether it actually was a misrepresentation.

Quite a bit of testimony was permitted to go into this case—perhaps a little more than the ordinary—to show the background of the issuance of this and other insurance policies. I think that was important testimony to enlighten the jury as to all surrounding circumstances so that you can find out and determine as a matter of fact whether there (148) was any misrepresentation in that regard. I say that to you for this reason: The defendant insurance company in this case says it was conscious, it was deliberate; and therefore the policy should be avoided, and it was because it would have turned up a physical condition which wasn't known from the other information. That is their argument to you, that is their contention, and on that basis they are asking a verdict at your hands.

There is other evidence here, however, which requires me to submit that question to you. There is evidence from the broker that at no time did Stopper know the general status of anything that he signed, that Weaver alone knew the status, and therefore it is not a wilful, conscious misrepresentation. There is also other testimony here—and I am leaving it all entirely to you for your determination—that he did make an application to Pan-American—that isn't denied—but that Pan-American, without rejecting the insurance, required certain other detailed information before they would consider issuing the policy; that thereafter neither Weaver nor Stopper paid any attention to their request; so, consequently, I am leaving it to you; Did either Weaver or Stopper consider that an abandoned application, not pending, because they hadn't furnished the required in-
(149) formation? It is a question of intent and good faith that I am leaving to you.

Now may I say this to you: If you find that Stopper had heart trouble and knew about it, if there is evidence in this record that convinces you by a fair preponderance of the evidence of that fact, the verdict should be in favor of the defendant in no sum of money. On the other hand, as to that element, if the evidence does not convince you; if you feel that Stopper did not know he had heart trouble, then he could make no conscious misrepresentation and that element of defense falls away.

As to the failure to make available to the defendant the fact of certain doctors' visits, which the defendant says is important to the risk, if you feel that that wasn't wilful and that in accordance with the application he made reasonable answers to the doctors, then that defense falls away; and, finally, if you feel that Stopper did not consciously misrepresent to the insurance company that he had no pending application of insurance, then that falls away, and in that event the plaintiff, who is admittedly the proper person to sue on these two contracts, would be entitled to the full face

value of each policy with interest at 6 per cent from October 12, 1951, to November 4, 1955.

(150) Now, members of the jury, in determining what the true facts are and in arriving at a verdict, it is your duty to appraise the witnesses, to consider whether they have an interest in the outcome, consider also their manner of testifying. Do they tell a reasonable, probable story or don't they? When you come into the jury box you carry with you the experience of twelve lives and an awful lot of good common sense. Apply that good common sense to the facts of this case in determining what the true answers are to these questions I have submitted to you.

While technically in any insurance case there is always a return of the premium, that question has been eliminated from this case, and I am going to ask you to return one of two verdicts. Your verdict in this case can be in only one of two fashions. Either it will be for the plaintiff in the sum of $40,000 with interest from October 12, 1951, to November 4, 1955—that would be $40,000 plus interest, X dollars total —or it would be for the defendant in no sum of money.

Those are the two verdicts which you can render in this case, and may I say to you that all twelve of you must agree. Your verdict must be unanimous either way. Unless all twelve of you agree, it is not the verdict of the jury.

(151) When you do agree, then it will be necessary for you to notify the Marshal, and he will return you to the court for delivery of the verdict in open court.

Is there any objection to the charge? If there is, I would like to hear it now so that I may correct it, if I have made an error, before the jury retires.

Come up to side bar, please.

(The following took place at side bar:)

Mr. McNally: Sir, I have one point. It is extra, because this arose during the speech of Mr. Rhoads, where he said, "Did this man when he made the application on July 13 forget that he had been to the doc-

tor?" Now, that may have carried the implication that our contention is that he did forget. We agree that he did not forget, but if it was for a trivial matter, then the omission of those visits, even though he did remember he went there, is not proof of bad faith.

The Court: I said that.

Mr. McNally: They might get the impression—

The Court: I can't tell what impression they might get, but I have said it.

Mr. Rhoads: I think Your Honor covered that.

(152) The Court: I think I did.

Mr. McNally: I just want to make the point that the forgetting is not the issue in the case. We are not contending that he forgot he went to the doctor. They might get the impression that we are contending he did forget.

The Court: All right. I will charge on your Number 5, Mr. McNally.

Mr. Rhoads: Your Honor will grant me an exception to the charge on his Number 5.

The Court: Oh, yes, surely.

Mr. Rhoads: If Your Honor pleases, in dealing with the second issue, Your Honor said there is a question as to whether the form of the question is such as would require specific dates or whether it would impress a layman as to specific dates as to treatment.

If Your Honor pleases, there isn't a question in this case as to specific dates. It is a question of whether the question asked required a statement of visits to the doctors, not the dates, but of recent visits to doctors for a condition, whether it was heart disease or any other disease, more than a minor thing, and whether
(153) the medicine that he was taking was for more than a

minor thing in the continued course of treatment. It is not a question of specific dates. It is a question of whether his answer as to treatments by other doctors—

The Court: I can cover both of them.

Mr. Rhoads: Your Honor several times in your charge said it was a question of conscious misrepresentation. The burden on the defendant is not to prove conscious misrepresentation. The burden is to prove either conscious and intentional misrepresentation or statements made so carelessly or so negligently or with such a disregard to the answer that the man can't be heard to say that the answer given is correct.

The Court: All right. I think that is right.

Mr. Rhoads: If Your Honor pleases, Your Honor also said there was testimony that Weaver alone knew. I think Your Honor should also say that even if they believe that testimony that Stopper didn't know and that Weaver alone knew, Weaver, under the facts in this case, was Stopper's agent and bound Stopper by his knowledge.

Mr. McNally: If Your Honor please, in answer to that point, where an agent may sometimes bind a prin-
(154) cipal, the knowledge of an agent cannot bind the principal where the principal is accused of making a conscious misrepresentation. That was one of my points.

Mr. Rhoads: Now, if Your Honor pleases, in referring to the Pan-American application you said the question on the evidence was whether they considered it abandoned. It wasn't a question of abandonment; it was a question of whether it was still pending, and there is no evidence that it wasn't.

Mr. McNally: The question is how they considered it, whether they considered it pending.

The Court: I left it to the jury.

Mr. McNally: I think that is correct.

Mr. Rhoads: Would Your Honor charge that the very fact that the questions are asked makes them material.

The Court: I think that is so.

Mr. Rhoads: There is no question of it under the Pennsylvania law.

Mr. McNally: I would object for the record to that statement, Your Honor.

The Court: Anything else?

Mr. Rhoads: I think that covers my exceptions, (155) Your Honor.

Mr. McNally: I just want to make that one point clear. I was afraid the jury might think that we were trying to show he did forget, and if they found that he did not forget, they should find for the defendant, but that is not so. We concede he did not forget, but we say it was for a minor ailment, and the failure to disclose a minor ailment such as a stomach ache is not proof of fraud.

I am particularly concerned with the Burton case in 368 Pa., where the man went several times, fifteen times, but they said—

The Court: I have that in front of me.

Mr. McNally: I will show Your Honor the sentence I have in mind in the opinion there:

". . . the jury could well have inferred, and in view of its verdict unquestionably did, that Burton had no realization that anything was seriously wrong with him, and that he supposed the treatments he underwent were the mere aftermath of the tonsil and adenoid operation which he reported in his application."

Mr. Rhoads: I am sorry, Your Honor. May I ask Your Honor to charge one other point. Would Your

Honor also charge that there is no burden on the in-
(156) surance company to investigate, but they have a right to rely on the application and the answers.

Mr. McNally: That is correct, but I don't think it is in issue. If they do investigate, then they are bound by it.

(End of proceedings at side bar.)

The Court: Members of the jury, I have been asked to elaborate somewhat on my charge. First of all, there is no duty on the insurance company to investigate any application. They have a right to rely upon the statements made in the application. However, they have the right to investigate, and one of the reasons assigned by the courts in a matter of failure of disclosure, particularly of a doctor, is that it forecloses investigation by an insurance company. They have the right; they do not have the duty.

As far as the application of the Pan-American is concerned, I have left it to you as to whether or not it should be considered a pending application. I am not going to change my charge on that. There is a conflict in evidence here, in my opinion, and I am leaving that question entirely to you; and as to the answers to any of the questions, the fact that they were asked in the
(157) application makes them material, and they should be answered completely and fully to the extent that a person is capable of answering.

Finally, the contention of the defendant as to the duty of Stopper to disclose recent treatments is that he had received certain treatment within a month or so of his application, and failure to disclose—not specifically by date, perhaps—but the area of treatment and the kind of treatment constituted bad faith.

Members of the jury, I have talked to you several times about conscious misrepresentation. When I say

"conscious misrepresentation," I mean in that sense a deliberate act, knowingly done. There is another kind of misrepresentation that is also involved in these contracts, and that is that if a person is so careless about facts which he knew or should know and answers them in such a way as to exhibit bad faith in the application, that would also come within the term of conscious misrepresentation as you are to apply it in this case.

Members of the jury, it is an important case, and it is the kind of matter that is definitely for a jury to determine, and I know that you will consider it thoroughly and consider it fully. It is important to both litigants, and all that either one is asking is justice
(158) under the law, full consideration by the jury and a fair verdict based upon the evidence in the case. I know you will consider it well and return a just verdict in accordance with your oath.

Mr. McNally: If Your Honor please, did you cover the one point I requested when I was up there?

The Court: What is that? About the forgetting?

Mr. McNally: Yes, the forgetting point.

The Court: I have told that to the jury, that it is not fraud on any insurance company not to report visits for minor matters, or if the insured so considered it, that in itself would not constitute fraud. Is that it?

Mr. McNally: Yes, sir.

The Court: Even if he knew about it and he didn't disclose it.

Mr. Rhoads: If Your Honor pleases, I must ask you to enlarge somewhat on your remarks to the jury about the conscious misrepresentation. The law also is that if they were so recent that he must have known of them, the plaintiff can't be heard to say that he forgot the treatments.

The Court: That is entirely true if they were for a serious condition, yes.

Mr. Rhoads: For anything other than a very minor illness.

(159) The Court: Yes, I will accept that, for anything other than a minor illness. I think that is implicit in everything that I said, Mr. Rhoads. It was my intention to convey that to the jury.

Let the Marshal be sworn. Let the exhibits go out, and the jury may consider the case.

(Joseph J. Duffy, Deputy Marshal, sworn.)

(The jury retired at 10:55 a.m.)

(The jury returned into court at 3:50 p.m. and rendered a verdict for the plaintiff in the amount of $40,000 plus interest of 6 per cent per annum from October 12, 1951, to November 4, 1955.)

Note:

Page 102a is blank.
Pages 103a - 108a
are on card 2.

DEFENDANT'S MOTION FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

AND NOW, this 9th day of November, 1955, the defendant, The Manhattan Life Insurance Company of New York, by its attorney, Owen B. Rhoads, Esquire, moves the Court to enter judgment for the defendant in accordance with defendant's motion for a directed verdict presented to the Court at the close of the evidence.

/s/ Owen B. Rhoads,
Attorney for Defendant

DEFENDANT'S MOTION FOR A NEW TRIAL.

AND NOW, November 9th, 1955, defendant, The Manhattan Life Insurance Company of New York, moves that the court grant a new trial in the above matter and assigns in support of its motion the following reasons:

1. The verdict was against the law.

2. The verdict was against the evidence.

3. The verdict was against the weight of the evidence.

4. The verdict was against the charge of the court.

5. The court erred in its rulings on the admission and exclusion of evidence as indicated by the objections and exceptions of counsel for defendant during the course of the trial.

6. The court erred in its charge to the jury as indicated by the exceptions of counsel for defendant taken at the close of the charge.

7. The court erred in admitting evidence as to the insured's activities, his appearance of health and his state of mind subsequent to July 13 and 16, 1951.

8. The court erred in permitting the insured's agent, Lester Weaver, to testify as to the signing and method of preparation of applications for insurance subsequent to July 13 and 16, 1951, and as to the asserted fact that some applications for insurance had been signed in blank.

9. The court erred in refusing to permit defendant to question Dr. Daniel B. Pierson, Jr., the insured's personal physician and heart specialist, as to the entries on his office records concerning the insured's state of mind as to his health and his knowledge of the heart condition which he had, while permitting plaintiff to introduce evidence as to the insured's state of mind concerning his heart condition.

10. The court erred in charging that the jury might consider that the application of Eugene A. Stopper for life insurance with the Pan-American Life Insurance Company had been abandoned.

11. The court erred in charging the jury that it might consider whether the insured's agent, Lester Weaver, alone knew the status of the Pan-American application and in failing to charge that Weaver's knowledge was also that of the insured.

12. The court erred in repeatedly charging the jury that defendant had the burden of proving the insured guilty of conscious misrepresentation without instructing the jury that it could find misrepresentation sufficient to set aside the policies if the insured carelessly or negligently answered the questions in the application or had knowledge of medical treatments for more than trivial indispositions so recent that he could not reasonably deny knowledge of them.

13. The court erred in charging the jury that in deciding whether the insured had failed to disclose medical treatments it should consider whether the form of the question asked in the application required specific dates of treatments or whether it would impress a layman as requiring specific dates as to treatments.

14. The court erred in failing to charge the jury that the evidence showed medical treatments and complaints so recent and so serious that the insured could not deny knowledge of them and could not properly have failed to reveal them because they were conditions such as could not have been overlooked or forgotten.

Defendant reserves the right to assign additional reasons for a new trial after the notes of testimony have been transcribed.

/s/ Owen B. Rhoads,
Attorney for Defendant

ORDER.

AND NOW, to wit, this 28th day of February, 1956, upon consideration of defendant's motion for a directed verdict and defendant's motion for a new trial, briefs submitted and oral argument had thereon, and it appearing to the Court that under the evidence adduced at trial the questions of whether or not the deceased had acted in good faith in answering the questions in his application for insurance as to prior visits to a doctor, whether or not he had answered truthfully the question as to other insurance applications, and whether or not he was aware of the fact that he was then suffering from a heart condition, were required under said evidence to be submitted to the jury; further, there appearing no substantial trial errors in the admission of evidence or mistakes of law in the charge of the Court which would warrant the granting of a new trial, Evans v. Penn Mutual Life Ins. Co. of Phila., 322 Pa. 547 (1936); Travelers Ins. Co. v. Heppenstall Co., 360 Pa. 433 (1948); Burton v. Pacific Mutual Life Ins. Co., 368 Pa. 613 (1951); Croll v. John Hancock Mutual Life Ins. Co., 198 F. 2d 562 (3rd Cir. 1952), it is

ORDERED, ADJUDGED AND DECREED that defendant's motions for judgment in its favor and for a new trial be and they are hereby DENIED.

BY THE COURT:

/s/ THOMAS J. CLARY

J.

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JUN 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~1049~~ 156

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN M. MCNALLY, JR.,
FLOYD W. TOMPKINS,
JAMES A. PEACE,
1232 Fidelity-Phila. Trust Bldg.,
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Philadelphia, Pa.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1956.

No.

CONSTANCE A. STOPPER,
Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Constance A. Stopper, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered January 31, 1957, which reversed the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the Plaintiff with instructions to enter judgment for the Defendant.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania has not been reported. The opinion of the United States Court of Appeals for the Third Circuit is officially reported in 241 F. (2d) 465. The opinions of the District Court and the Court of Appeals are set forth in the appendix herein at pages 15-24 incl.

JURISDICTION.

(a) The judgment of the United States Court of Appeals for the Third Circuit was entered on January 31, 1957.

(b) The petition of the plaintiff for a re-hearing was denied on March 5, 1957.

(c) The jurisdiction of this Court is invoked under the provisions of the Act of June 25, 1948; 62 Stat. 928; 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Did not the Circuit Court of Appeals, in directing the verdict in favor of the defendant, re-examine the facts and deprive the plaintiff of her right to trial by jury, in violation of the Seventh Amendment to the United States Constitution?

2. Did not the Circuit Court of Appeals in directing a verdict in favor of the defendant in this case, so misapply the law of Pennsylvania, as to reach a result directly contrary to that which would have been reached in the Pennsylvania Courts?

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Court of the United States, in cases where they apply."

STATEMENT OF THE CASE.

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship.

The plaintiff, Constance A. Stopper, sought to recover upon two policies of insurance issued on July 19, 1951, by the defendant, The Manhattan Life Insurance Company of New York, upon the applications dated July 13, 1951, in the total amount of $40,000.00 upon the life of Eugene A. Stopper, plaintiff's husband.

Stopper died on October 12, 1951, at the age of 66, of a heart attack. Demand was made upon the defendant for payment which was refused on the basis of alleged fraudulent misrepresentations made by the insured in his application.

The pertinent questions and answers in the application are as follows:

Part I, Question 7(b):

> "Is any application, or reinstatement pending or contemplated in any other company?" "No."

Part II: Question 13:

> "Have you been examined for, or made application to any life, health or accident insurance company, or have you any application pending, on which a policy has not been issued, or issued on a different basis than that originally applied for?" "No."

Part II, Question 16 (b):

"Have you suffered from any ailment or disease of the heart, blood vessels, or lungs?" "No."

Part II, Question 19:

"What other Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below.)"

"Dr. Daniel Pearson, 1830 Delancey, Goes twice yearly to Dr. Pearson for physical examination. No illness."

The defendant introduced Dr. Pierson's records in evidence which showed that the deceased made six visits to the doctor between May 3, 1951 and July 13, 1951, the date of the application. These visits covered a period of ten weeks prior to the application.

On May 3, and on June 11, 1951, the insured complained of epigastric discomfort.

For a period of seven weeks or until June 21, 1951, the doctor gave no prescription except Thiamine Chloride (Vitamin B_1) and stopping of coffee in the morning.

For the first time on June 21, 1951, the doctor prescribed nitroglycerin and aminophylline as a trial therapy "for the syndrome of pain, epigastric, precordial and arm." (38a, 40a)

The doctor never told the insured to cease work or to slow down his activities (40a).

At no time did the doctor ever tell the insured that he had a heart condition or any other serious disorder (39a).

The doctor admitted that the insured had a past history of epigastric discomfort (35a). Defendant knew of this from the Dominion Life Insurance file (79a).

This testimony was presumably the basis for the jury's conclusion that Stopper considered his visits to the doctor during May and June of 1951, to be for a recurrence of this non-serious disorder.

The testimony on behalf of the plaintiff disclosed that the insured, a prominent architect, worked an average of 16 hours a day during the year 1951, continuing up to the very date of his death, was healthy and energetic, never made any complaints about his physical condition (69a), the only medicine he took was for stomach distress (70a), and during the summer of 1951 made plans for a trip to Europe in the fall (73a).

There was testimony that Stopper first applied for insurance in various companies in February, 1951, long before the visits to his Doctor. This insurance was in furtherance of a partnership formed with Gilboy and O'Malley and the record discloses that these two policies were originally made payable to the other two partners. Only after Stopper's death, were the policies assigned to the plaintiff in settlement of the partnership affairs.

On the question of pending applications, the defendant introduced testimony that the insured signed an application with Pan American Insurance Company on June 5, 1951, that was never issued.

The plaintiff introduced testimony by Stopper's insurance broker, Weaver, that some applications were signed in blank (60a), and that he, the broker, never told Stopper about the status of the Pan American application (61a), and that no further action was taken on this application merely because the Company was too slow in its processing (63a).

The trial judge submitted the case to the jury on the basis that there was a conflict of evidence on all three issues:

(a) Knowledge of heart condition;

(b) bad faith in the negative answer concerning pending applications;

(c) whether Stopper knew he was being treated for a serious condition.

The trial judge charged the jury that if Stopper knew he had a heart condition and concealed it from the insurance company, there should be a verdict for the defendant.

The trial judge also left to the jury, the question of whether under all the circumstances, the insured acted in good faith in answering the question as to other insurance applications.

On the question of the doctor's visits, the trial judge charged that it is not a fraud under the law of Pennsylvania to fail to disclose every visit to the doctor if, in the opinion of the insured, it was for some trivial matter.

The jury returned a verdict in favor of the plaintiff in the amount of $40,000.00 with interest from October 12, 1951 to November 4, 1955.

The Circuit Court of Appeals reversed and directed the entry of judgment for the defendant, on the ground that it could be inferred as a matter of law, from the number of visits to the doctor and the treatments prescribed, that Stopper knew he was being treated for a serious disorder, and on the additional ground that the negative answer to the question of pending applications, was fraudulent, whether or not such answer was material to the risk.

REASONS FOR GRANTING WRIT.

1: The Circuit Court of Appeals Did Not Follow the Applicable Law of Pennsylvania.

The Circuit Court of Appeals directed a verdict for the defendant by inferring as a matter of law, knowledge by Stopper of his serious condition from the six visits to the doctor and the treatment prescribed. That the Circuit Court of Appeals did so is clear from its opinion (Appendix, pages 18-19):

> "In our judgment the character of these symptoms, their frequent recurrence and the steps taken by the attending physician were such that no rational person in Stopper's position could have regarded this recent medical history as too inconsequential to report to an insurance company concerned with the application of a 66 year old man for life insurance."

This was in direct conflict with the law of Pennsylvania as set forth in the case of *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), wherein the Supreme Court of Pennsylvania upon facts much more susceptible to such inferences stated on page 615:

> "The evidence discloses beyond any doubt that Burton was suffering from an incurable cancer of the throat at the time he applied to defendant for insurance. Obviously, he was not in good health at that time and he was being treated for more than defective tonsils. However, there is absolutely no evidence that he knew his answers to those questions were false. Defendant seeks to have us infer knowledge from the long course of treatment and the medical records. This we cannot do under the facts here presented."

As a result of this misconception of Pennsylvania law, the Circuit Court of Appeals brushed aside the very facts

in this case, such as long hours of work, plans for the future, belief that the treatments were for previous stomach trouble and non-disclosure by the doctor to insured of his heart condition, which the Supreme Court of Pennsylvania approved as a basis for the finding of the jury that Burton did not realize that anything was seriously wrong with him, even though he had been to a doctor, whose name he did not reveal, twenty-eight times for X-ray treatments for a cancerous growth in his throat.

These mistakes made by the Circuit Court of Appeals were premised upon a misinterpretation of the basic principle as set forth in the leading case of *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936).

The Circuit Court of Appeals concluded that a knowingly false statement by an applicant establishes a conclusive presumption of fraud which permits no evidence to the contrary. Such conclusion which is directly contrary to the law of Pennsylvania is set forth in its opinion (Appendix, page 21):

> ". . . the knowledge of the insured that he is making a false statement itself establishes the bad faith on the basis of which a verdict *must* be directed." (Emphasis supplied.)

But the law of Pennsylvania is only that such evidence raises a presumption of fraud, which may be contradicted, rebutted, or explained by other evidence, and on which a verdict *may* be directed only if there is no evidence to the contrary.

The actual quotation from the case of *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936) is as follows on page 560:

> "Where the statements are made representations, the insurer, to avoid the policy, must show they were false and insured knew they were false or otherwise acted in bad faith in making them. If such falsity and the requisite bad faith affirmatively appear from com-

pefent and uncontradicted documentary evidence, . . . a verdict may be directed for the insurer. But whenever disputed questions of fact are presented by conflicting evidence, whether documentary or oral, . . . the case must be submitted to the jury, subject to the trial court's power to award a new trial as often as in its sound discretion it may think the interests of justice require."

As an additional ground for directing the verdict the Circuit Court of Appeals held that the denial of other insurance applications was fraudulent, without regard to the materiality of the statement.

This holding is patently in direct conflict with the law of Pennsylvania, which states that "the materiality of the statement with regard to the risk involved is a relevant matter for consideration in determining whether a false statement is made with intent to deceive". *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936).

Where there has not been a rejection of the risk, the negative answer is immaterial, and such immateriality makes the good faith of the insured, in so answering, a question of fact and not of law which must be decided by a jury.

In accord with this principle, the Supreme Court of Pennsylvania has never declared a negative answer as to other insurance applications fraudulent, as a matter of law, unless there actually was a rejection or a classification as a substandard risk. Therefore, this conclusion of the Circuit Court of Appeals was clearly erroneous particularly since there was ample evidence to support the jury's finding either that Stopper was unaware of the pending application, or that it had been abandoned and therefore was not pending.

Finally, the Circuit Court of Appeals has disregarded the distinction made by the Supreme Court of Pennsylvania

between the cases in which the insured concealed either hospitalization or the names of one or more doctors that treated him and those in which the insured, just as in the instant case, disclosed hospitalization and the name of the doctor or doctors that treated him and failed to give all the details. In only the first class of cases has the Supreme Court of Pennsylvania ever upheld a directed verdict for the insurer.[1]

Since the Circuit Court of Appeals failed to follow the law of Pennsylvania, a situation is presented which warrants this Honorable Court in granting the Writ of Certiorari as it has done on many occasions.

Erie R. Co. v. Tompkins, 304 U. S. 64; 82 L. ed. 188, 58 S. C. 817 (1938);
Guaranty Trust Co. v. York, 326 U. S. 99; 89 L. ed. 2079, 65 S. C. 1464 (1946);
Gibson v. Phillips Petroleum Co., 352 U. S. 874, 1 L. ed. 2d 77, 77 S. C. 16 (1957);
See also *Rules of Decision Act*, 28 U. S. C. Sec. 1652.

2. The Circuit Court of Appeals Deprived the Plaintiff of Her Right to Trial by Jury Contrary to the Seventh Amendment to the United States Constitution.

While recognizing that under Pennsylvania law, the issue in the case was whether the insured knew he was being treated for a serious condition, since all cases hold

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1. It is to be noted that in all six cases cited by the Circuit Court of Appeals in its opinion, as authority for the directed verdict, there was a concealment of hospitalization or the names of one or more doctors that treated the insured. As an example of the second class of cases, into which the instant case falls, are the following:

Travelers Insurance Co. v. Heppenstall Co., 360 Pa. 433, 61 A. 2d 809 (1948);
Baer v. State Life Insurance Co., 256 Pa. 177, 100 Atl. 755 (1917).

that the actual existence of a serious disease is immaterial[2] if the insured has no knowledge thereof, the Circuit Court of Appeals as noted above, erroneously inferred such knowledge as a matter of law from the record of the visits to the doctor and the treatment prescribed.

The Circuit Court of Appeals compounded this error by discussing in its opinion only those facts favorable to the defendant and ignoring those favorable to the plaintiff, in direct violation of the precept of this Honorable Court in *Wilkerson v. McCarthy*, 336 U. S. 53, 57, 93 L. ed. 497, 502, 69 S. Ct. 413 (1949):

> "In passing upon whether there is sufficient evidence to submit an issue to a jury, we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

It is clear that the plaintiff has been deprived of the right to trial by jury in violation of the Seventh Amendment to the United States Constitution, unless the inferences drawn by the jury were "without support in the evidence". *Tennant v. Peoria and P. U. R. Co.*, 321 U. S. 29, 35, 88 L. ed. 520, 525, 64 S. Ct. 409 (1944).

The finding of the jury that Stopper did not realize he was being treated for anything serious, is certainly supported by the evidence that he had a past history of stomach trouble (35a, 38a)) that his complaints during May and June of 1951 were of epigastric discomfort (Doctor's record, Appendix pages 19-20), that for seven weeks, the only prescription given to him was Vitamin B_1 and advice to stop coffee in the morning, that the doctor pre-

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2. *Evans v. Penn Mutual Life Insurance Co.*, 322 Pa. 547, 186 Atl. 133 (1936), *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), *Adams v. Metropolitan Life Insurance Co.*, 322 Pa. 564, 186 Atl. 144 (1936), *Travelers Insurance Co. v. Heppenstall Co.*, 360 Pa. 433, 61 A. 2d 809 (1948).

scribed nitroglycerin for the first time on June 21, 1951 only three weeks before the signing of the application as a trial therapy, "for the syndrome of pain, epigastric, precordial and arm" (38a, 40a), that during 1951, he worked 16 hours a day as an architect until the day of his death (53a-55a) and made plans for a trip to Europe later in the fall of 1951 (73a).

Certainly it was reasonable for the jury to infer from such evidence that Stopper believed that nothing was seriously wrong with him other than a recurrence of his old stomach trouble, particularly since the doctor never told him that he had heart trouble or that he should slow down (39a, 40a).[3]

In deciding, as a matter of law, that Stopper knew something was seriously wrong with him, the Circuit Court of Appeals has charged him with greater knowledge than his own doctor, who only suspected a heart condition three weeks before the application and never told Stopper of his suspicions.

In addition, the evidence that Stopper's application revealed the name of his doctor, that he had had an electrocardiogram taken and authorized the defendant to consult his doctor, warranted the jury's conclusion that he acted in good faith.

The finding of the jury that Stopper acted in good faith in answering the question of other insurance applications is supported by the evidence that his agent, Weaver, who was processing his insurance applications never mentioned the status of the Pan American application (62a, 63a), that Stopper knew nothing of the status of various applications (62a, 63a) that Weaver never paid any attention to the Pan American application because the company was slow in acting (63a), that Weaver had Stopper sign

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3. The Supreme Court of Pennsylvania approved similar findings of the jury in the case of *Burton v. Pacific Mutual Life Insurance Co.*, 368 Pa. 613, 84 A. 2d 310 (1951).

some applications in blank (59a) and that this application had never been rejected (17a).

The jury was certainly entitled to find that Stopper, not knowing the status of his various insurance applications answered this question in good faith, particularly since no fraudulent motive could be attributable to his negative answer. What would an affirmative answer have revealed, other than the fact that another insurance company was seeking Stopper as a policy holder? This immateriality clearly made the good faith of the answer a factual issue, solely for the jury.

Since the evidence amply supports the verdict of the jury, it is clear that the Circuit Court of Appeals disagreed with their findings and substituted its own conclusions of fact. Its entire opinion reveals the attempt to support by evidence from the record its own factual conclusions. That prerogative belongs exclusively to the jury under the Seventh Amendment, as this Honorable Court has noted in *Rogers v. Missouri P. R. Co.*, 352 U. S. 500, 1 L. ed. 2d 493, 498, 77 S. C. 443 (1957):

> "We may assume that the jury could properly have reached the Court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make."

The invasion by the Circuit Court of Appeals of the province of the jury in this case clearly warrants the granting of the Writ of Certiorari, just as did similar action of other Courts of Appeals and the Supreme Court of Missouri in the following cases:

Rogers v. Missouri P. R. Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. C. (1957);

Webb v. Illinois Central R. Co., 352 U. S. 512, 1 L. ed. 2d 503, 77 S. C. 451 (1957);

Ferguson v. Moore McCormack Lines, 352 U. S. 521, 1 L. ed. 2d 511, 77 S. C. 457 (1957);
Gibson v. Phillips Petroleum Co., 352 U. S. 874, 1 L. ed. 2d 77, 77 S. C. 16 (1957).

3. The Questions Here Presented Are Important and of Far-Reaching Effect.

There are millions of people in the State of Pennsylvania alone, who have taken out insurance policies. It is imperative that all such policy holders be treated alike. Their rights to receive the proceeds should be governed by the rules laid down by the Supreme Court of Pennsylvania, whether their companies are domestic or foreign corporations. The institution of suit in the United States District Court rather than in the State Court should not change that right. There must be one set of rules for both forums.

The action of the Circuit Court of Appeals in setting its own standards to determine the fact of misrepresentation, instead of following the law of the State Forum, cannot be allowed to stand.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

AND NOW, to wit, this 28th day of February, 1956, upon consideration of defendant's motion for a directed verdict and defendant's motion for a new trial, briefs submitted and oral argument had thereon, and it appearing to the Court that under the evidence adduced at trial the questions of whether or not the deceased had acted in good faith in answering the questions in his application for insurance as to prior visits to a doctor, whether or not he had answered truthfully the question as to other insurance applications, and whether or not he was aware of the fact that he was then suffering from a heart condition, were required under said evidence to be submitted to the jury; further, there appearing no substantial trial errors in the admission of evidence or mistakes of law in the charge of the Court which would warrant the granting of a new trial, Evans v. Penn Mutual Life Ins. Co. of Phila.; 322 Pa. 547 (1936); Travelers Ins. Co. v. Heppenstall Co., 360 Pa. 433 (1948); Burton v. Pacific Mutual Life Ins. Co., 368 Pa. 613 (1951); Croll v. John Hancock Mutual Life Ins. Co., 198 F. 2d 562 (3rd Cir. 1952), it is

ORDERED, ADJUDGED AND DECREED that defendant's motions for judgment in its favor and for a new trial be and they are hereby DENIED.

By THE COURT:

/s/ THOMAS J. CLARY

J.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 27, 1956

Before BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed January 31, 1957)

HASTIE, *Circuit Judge.*

This is an action under diversity jurisdiction, upon two insurance policies issued July 19, 1951 by the Manhattan Life Insurance Company, a New York corporation, on the life of Eugene Stopper, a Pennsylvanian. The

insured died of a heart attack on October 12, 1951. The insurer denied liability, except for return of premiums, on the ground that Stopper had made fraudulent misrepresentations in his applications for insurance, dated July 13, 1951. Trial to a jury resulted in a verdict for the plaintiff in the full amount of the policies. Judgment was entered on this verdict after the trial judge denied defendant's motion for judgment in accordance with its earlier timely motion for a directed verdict. This appeal followed.

The appellant urges that the court below erred in leaving to the jury the decision whether certain unquestionably false statements in the insurance applications were of such fraudulent character as to vitiate the policies thus obtained. The parties properly recognize that this issue is to be resolved in accordance with Pennsylvania law, since this is a diversity case brought in a district court in Pennsylvania. *Croll v. John Hancock Mut. Life Ins. Co.*, 3d Cir. 1952, 198 F.2d 562.

The applications for insurance contained the following questions and answers upon which insurer rests its claim of fraudulent misrepresentation:

> "Part 1 . . .
>
> ". . . .
>
> "7(b). Is any application or reinstatement, pending or contemplated in any other company? (Give details).
>
> "[Answer] No".
>
> "Part 2 . . .
>
> ". . . .
>
> "13. Have you ever been examined for or made application to any life, health, or accident insurance company or have you any application pending on which a policy has not been issued . . . ?
>
> "[Answer] No.".

"

"16(b). Have you ever suffered from any ailment or disease of the Heart, Blood Vessels or Lungs?

"[Answer] No."

"

"19. What . . . Physician or Physicians have you consulted or been treated by, within the last five years? (Give details below).

"[Answer] Dr. Daniel Pearson [sic] 1830 Delancey.

Goes twice yearly to Dr. Pearson for physical examinations—No illness."

The insured also certified that he had read the answers to the questions in Part 1 and Part 2 before signing and that they had been "correctly written as given by me, and are full, true and complete and there are no exceptions to any such answers other than stated herein."

Undisputed documentary evidence establishes the basic facts concerning Stopper's answer to the last of the foregoing questions, the inquiry about medical consultations and treatments during the last five years. In answering that question Stopper reported his routine semi-annual physical check-ups by his personal physician Dr. Pierson, but saw fit to omit any mention of six unusual visits to his personal physician since the last semi-annual check-up and within the ten weeks immediately preceding his application to Manhattan for life insurance. Indeed, one such medical visit was made only two days before the execution of the insurance application and an appointment was then made for another visit which occurred the very day of the insurance application. On these occasions he reported distress and discomfort suffered in connection with recurring and rather dramatic symptoms of malaise. In our judgment the character of these symptoms, their frequent recurrence and the steps taken by the attending physician were

such that no rational person in Stopper's position could have regarded this recent medical history as too inconsequential to report to an insurance company concerned with the application of a 66 year old man for life insurance. This conclusion is predicated upon and required by Dr. Pierson's written record of this patient's visits as introduced into evidence in this case. Because we regard that record as decisive, we set it out verbatim:

[Dr. Pierson's Clinical Record]

5-3-51 In Harrisburg three weeks ago walked about four blocks. After eating heavy dessert of some apple cake and had all gone feeling in epigastrium dyspnea and sweating requiring sitting to rest a while before going to a meeting. This occurred once since after walking. And mildly several times unassociated with activity except that during these three weeks things have been very busy and rather tense.

Blood Pressure 155/90 Heart O.K. at 76. No murmurs. Chest O.K. ECG. shows within N [i.e., normal]. Urine negative except for faint trace albumin. Rx Thiamine chloride 10 mgm. p.c.

5-28-51 X-ray of chest 5/26—Dilation and elongation of aorta. No cardiac enlargement. Conference with Mr. Weaver and Mr. —— cardiogram and x-ray report given them.

6-11-51 Epigastric discomfort, then precordial pain, sense of choking and dull heaviness left arm come shortly after breakfast and 1-2X last week at other times of day. Sounds like angina but doesn't accompany exercise, etc. Blood pressure 140/80. (Belched several times while here.) To stop coffee in A.M. and to get Master 2 step test at hospital.

6-14-51 E.C.G. and Master 2 step at Lankenau Hospital show slight S.T. sag in some of chest leads returning to N [i.e., normal] in 6 minutes. Has stopped coffee in A.M. and more comfortable tho has had small A.M. attack of short duration. Admits tension in new project. Recheck one week and Rx aminophylline if further symptoms.

6-21-51 Attack yesterday, shortly pt. lunch lasting about two hours. Then O.K. since. Feels some precordial discomfort today. Blood pressure 140/85. Heart regular 72. Rx. aminophylline gr. iii t.i.d [i.e., grains 3, 3 times daily]. Nitroglycerine grains 1/100 under tongue p.r.n. [if needed for pain].

7-11-51 In Cape May 10 days and felt well. Took nitroglycerin four times. Returned Philadelphia yesterday and had attack this A.M. requiring nitroglycerin. Blood pressure 140/85. Heart modal. Rx same and check in two days and consider Kehlen Therapy.

7-13-51 Has been better but still aware of precordial discomfort. Blood pressure 130/80. Heart physiologic. Rx. nitroglycerin p.r.n. [i.e., as needed]. Eskel 40 millograms. No. L. Start one at bedtime and build to 3 a day unless nausea.

To offset this record it has been argued to us that other evidence shows that Stopper may not have known that his symptoms indicated any heart ailment. If this argument has any validity, it is still beside the point. Stopper's six visits to his physician within a short period and the dramatic painful and recurring symptoms which he reported on these occasions are the clearest manifestations of his own realization that something out of the ordinary was wrong. And though Dr. Pierson may not have stated any particular diagnosis to the patient, the doctor's

prescriptions and the tests he ordered must have made it obvious to Stopper that the doctor was not dismissing the illness as inconsequential. We have not overlooked an additional contention that Stopper may have considered his symptoms no more than dispepsia which he had experienced previously. We simply think this suggestion cannot be squared with Dr. Pierson's record of what was said and done.

In addition, the fact that Stopper considered even his routine semi-annual visits to his physician for check-ups important enough to report on his insurance application makes it unthinkable that he could in good faith have ignored his six most recent and most unusual visits for treatment for recurring visceral pain, reporting instead, "no illness". Thus, on the documentary record alone we have a clear picture of willful misrepresentation in answer to Manhattan's inquiry about recent medical consultation and treatment.

Appellee's brief properly recognizes that under the law of Pennsylvania, as applicable to a case like this, the trial court should direct a verdict for the insurer "if the uncontradicted documentary evidence shows that statements in the application were false and that insured either knew they were false or otherwise acted in bad faith in making them." This principle is clearly stated in the much cited and often followed case of *Evans v. Penn Mut. Life Ins. Co.*, 1936, 322 Pa. 547, 186 Atl. 133. For present purposes it is noteworthy that under this authoritative doctrine the knowledge of the insured that he is making a false statement itself establishes the bad faith on the basis of which a verdict must be directed. This is such a case, since the documents in evidence make it clear that the insured must have known that he was withholding the more recent and significant part of the information requested concerning medical consultations and treatment while volunteering less current and significant data.

While each case in this area must depend upon its peculiar facts, we think the Pennsylvania decisions with reference to the withholding of information about recent medical visits indicate by analogy the propriety of directing a verdict for the insurer in the present case. Cf. *Kizirian v. United Benefit Life Ins. Co.*, 1956, 383 Pa. 515, 119 A.2d 47; *Freedman v. Mutual Life Ins. Co.*, 1941, 342 Pa. 404, 21 A.2d 81; *Reeder v. Metropolitan Life Ins. Co.*, 1941, 340 Pa. 503, 17 A.2d 879; *Bailey v. Pacific Mut. Life Ins. Co.*, 1939, 336 Pa. 62, 6 A.2d 770. Nor is *Burton v. Pacific Mut. Life Ins. Co.*, 1951, 368 Pa. 613, 84 A.2d 310, relied upon by appellee, inconsistent with this analysis. For there the insured did disclose visits to physicians in connection with a tonsilectomy, and the evidence permitted the conclusion that he was unaware that he had experienced anything beyond postoperative treatment consequential to that surgery. Moreover, this court, applying Pennsylvania law, has required a verdict for the insurer in cases rather similar to the one now on appeal. *Guardian Life Ins. Co. of America v. Clum*, 1939, 106 F.2d 592; *Croll v. John Hancock Mut. Life Ins. Co.*, 1952, 198 F.2d 562.

In summary, we find wholly applicable to the facts before us the statement of the Supreme Court of Pennsylvania in *Freedman v. Mutual Life Ins. Co. of New York, supra*, at 409, 21 A.2d at 84:

> "... Thus, where it is established by uncontradicted documentary evidence that the insured has consulted physicians so frequently, or undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance, bad faith may be inferred as a matter of law if the insured denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received during the period of inquiry."

While the knowingly false statement of the insured concerning the nature and frequency of his recent visits to Dr. Pierson was in itself a sufficient ground for directing a verdict for the insurer, we find it equally clear that Stopper made a willfully false statement in answer to an inquiry about other insurance applications. It will be remembered that question 13 in Part 2 of the Manhattan application read as follows: "Have you ever been examined for or made application to any life, health or accident insurance company or have you any application pending on which a policy has not been issued?" Stopper's answer was "No". The falsity of this statement is proved by a document in evidence in this case, namely, an application to the Pan American Life Insurance Company for life insurance in the amount of $50,000 signed by Stopper and dated June 5, 1951, on which, admittedly, no policy had been issued. Standing alone this document would suffice to establish Stopper's awareness of a circumstance he was required to disclose in this Manhattan application executed five weeks later on July 13, 1951.

In an effort to excuse Stopper's failure to disclose this Pan American application, plaintiff below introduced evidence that Stopper had needed $100,000 of life insurance for business purposes and, with that in view, had signed various but unspecified insurance applications in blank. This is said to provide a basis for a permissible inference that the Pan American application was one of those signed in blank and that Stopper did not know of the submission of the Pan American application when he executed his subsequent application to Manhattan. This argument fails because it ignores Part 2 of the Pan American application which lists answers given by Stopper to the medical examiner of the Pan American Insurance Company concerning his medical history. It appears on the face of the document, and by corroborating testimony as well, that Stopper executed this portion of the application in the presence of the Pan American medical examiner on June 5, 1951. On the

record, therefore, Stopper's denial that he had "ever been examined for or made application to any life, health or accident insurance company" without obtaining a policy or that he had "any application pending on which a policy has not been issued . . ." must stand as willfully false. The question was in alternative form and he must have realized that the Pan American application was covered by at least one of the stated alternatives. Cf. *Blough v. Modern Woodmen of America*, 1946, 159 Pa. Super. 249, 48 A.2d 37; *Matovich v. Mut. Benefit Health & Accident Ass'n.*, 1945, 157 Pa. Super. 604.

It is our conclusion that the documentary evidence so palpably disclosed the perpetration of a fraud upon the insurer that the direction of a verdict for the defendant was the only course consistent with law and justice. We are confident that the courts of Pennsylvania would reach the same conclusion on these facts.

The judgment will be reversed with instructions to enter judgment for the defendant.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897.

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with instructions to enter judgment for the defendant. With costs.

Attest:

IDA O. CRESKOFF
Clerk

January 31, 1957

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,897.

CONSTANCE A. STOPPER

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, GOODRICH and HASTIE, *Circuit Judges*.

Order.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

WILLIAM H. HASTIE,
Circuit Judge.

Dated: March 5, 1957

FILED
JUL 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted] 156

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN RE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1956

No. 1049

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN RE PETITION FOR WRIT OF CERTIORARI.

(a) Respondent's Reference to "Notorious Tobyhanna Signal Corps Project" Is Irrelevant and Scandalous.

The respondent, in its brief (page 3), has scandalized the decedent's participation in the "Tobyhanna Signal Corps Project" a matter which is not only outside the record but concerning which charges were made after the trial. The fact that the respondent introduced this subject indicates its belief that the Court of Appeals must have been influenced thereby. These charges were aired publicly shortly before the delayed decision of the Court of Appeals.

It is necessary for petitioner to point out that the work began on the Tobyhanna project after Stopper's death, at

which time the plans were not completed. It is also important that Stopper is dead and cannot defend himself, against defendant's innuendoes.

Petitioner's counsel is well acquainted with Stopper's reputation, personal and professional. Stopper (65 years old) had a long and honorable career as an architect in the Philadelphia area. During his career he undertook many important projects and performed them with skill and integrity. His professional ability and personal integrity were never before questioned.

It was this excellent reputation on both counts that impelled Gilboy and O'Malley, two younger men, to seek Stopper for their partnership in handling the architectural and engineering work on the Tobyhanna project. Not only is it clear that the partnership would not have obtained the Tobyhanna contract without Stopper but, from counsel's personal knowledge of the man, it is equally clear that none of the charges now publicized would have occurred, if Stopper had remained alive.

There is something immoral in the aspersions cast upon a dead man's reputation by the respondent, in an attempt to divert the Court's attention from the legal principles involved.

The references to the Tobyhanna project made by the respondent are irrelevant, impertinent and scandalous. They deserve no consideration except censure.

(b) The Petitioner's Raising of the Constitutional Question in the Petition for Rehearing Was Timely.

The respondent contends that the petitioner was too late in asserting the Court of Appeal's violation of the Seventh Amendment in the petition for rehearing.

In all the cases cited by the respondent in support of this principle, a petitioner's constitutional privileges had been violated by the lower court. Of course, in such in-

stances the constitutional question had to be raised on appeal. Thus, if the lower court in the instant case had directed a verdict for the respondent, then the petitioner would have had to include the constitutional question upon the appeal. But the petitioner's constitutional rights were denied for the first time when the Court of Appeals, in violation of the Seventh Amendment, re-examined the facts already determined by the jury.

The controlling cases are not those cited by the respondent but those which state the well settled doctrine that when a constitutional privilege is denied for the first time by the ruling made on appeal, the injured party may challenge this ruling upon a motion for re-hearing, and such challenge will be timely.

Missouri v. Gehner, 281 U. S. 313, 320 (1930);
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 678 (1930);
Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 367 (1932).

(c) Respondent Misstated the Facts in the Following Instances:

On page 12 of its brief, respondent stated that Stopper's concealment of an electrocardiogram was fraudulent. The record discloses (page 104a) that Stopper in answer to question 12 of Part 2 of the application states specifically that he had "X-rays and e.c.g. this year".

In answer to petitioner's claim that the Court of Appeals failed to distinguish, as does the Supreme Court of Pennsylvania, between those cases in which the insured concealed the names of one or more of his doctors or hospitalization [*Derr v. Mutual Life Insurance Company of New York*, 351 Pa. 554, 41 A. 2d 542 (1945); *Reeder v. Metropolitan Life Insurance Company*, 340 Pa. 503, 17 A. 2d 879 (1941); *Freedman v. Mutual Life Insurance Company of*

New York, 342 Pa. 404, 21 A. 2d 81 (1941)] * and those cases such as the instant case, in which the name of the doctor and hospitalization were disclosed but the details not fully given (Petition, pages 9-10), the respondent does not deny that the Supreme Court of Pennsylvania has approved directed verdicts in only the first type of case, but deliberately misstates the facts in an attempt to place the instant case in the first group.

Respondent states that "in this case the insured concealed the fact that Dr. Pierson was treating him for heart symptoms". (Respondent's brief, page 15, footnote 8.) This statement completely disregards the facts found by the jury from the evidence, which must be accepted upon this appeal. At the trial Dr. Pierson testified that he never told Stopper he had a heart condition (39a). In addition the trial judge charged the jury that if Stopper knew he had a heart condition and failed to reveal it there should be a verdict for the defendant (94a). Therefore, since the verdict for the plaintiff establishes the fact that Stopper did not know he had a heart condition, there could be no concealment of this condition by the insured.

(d) The Citation of the Case of American Union Life Insurance Co. v. Judge, 191 Pa. 484, 43 Atl. 374 (1899) Is Misleading.

The respondent has cited the above case to the Court of Appeals and to this Court (Respondent's brief, page 17, footnote 10) as authority for the principle that a false answer to the question of pending insurance applications is

* The following quotation from the *Freedman* case on page 13 of respondent's brief highlights the distinction between the two types of cases. It will be noted that the *Freedman* case states

> "Bad faith may be inferred as a matter of law if the insured denies in his answer that *any* physician has been consulted or *any* medical or surgical treatment has been received during the period in inquiry". In the instant case the name of the attending doctor was revealed.

fraudulent per se. The respondent fails to mention that the *Judge* case involved an insurance policy in which the answers were considered warranties, so that falsity in itself, regardless of bad faith was a complete defense, whereas the instant case requires that false answers must be found to be fraudulent misrepresentations made in bad faith in order to defeat recovery thereon. It will be noted that the *Judge* case was decided in 1899 before the principle of fraudulent misrepresentation was applied to insurance policies in Pennsylvania.

For the reasons above set forth it is clear that the respondent has failed to answer petitioner's argument that there were facts in the record to sustain the finding of the jury that Stopper did not act in bad faith.

Both the Court of Appeals and the respondent have ignored the fact that any evidence of bad faith that could be inferred from Dr. Pierson's record has been explained and contradicted by opposing evidence. Therefore, there was no uncontradicted evidence of bad faith which would allow a directed verdict, but conflicting evidence which had to be decided by a jury.

CONCLUSION.

For the foregoing reasons, the petition for certiorari must be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~1049.~~ 136

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 1049.

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 241 F. 2d 465. The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported, but appears in the record at page 112a.[1]

JURISDICTION.

The jurisdiction of the court is invoked under 28 U. S. C. Section 1254(1) upon a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

1. All references to exhibits and page references followed by the letter "a" are to pages of the Appendix to Brief for Appellant in the court below, unless otherwise indicated.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a constitutional question which was not presented at any time to the court below should be considered for the first time upon petition for certiorari; where the question arises from the asserted denial of a right to trial by jury by the entry by a Court of Appeals of judgment notwithstanding the verdict upon a timely motion for judgment in accordance with a motion for a directed verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

2. Whether a decision of a Court of Appeals in a diversity case involving solely a question of state insurance law, decided in accordance with the established principles of the state law as applied to the special facts in evidence, merits review upon petition for certiorari.

STATEMENT OF THE CASE.

Petitioner brought suit in the United States District Court for the Eastern District of Pennsylvania upon two insurance policies which were issued by respondent on July 19, 1951 on the life of petitioner's husband, Eugene A. Stopper, an architect, who died of a heart attack less than three months after the policies were issued. Respondent defended on the ground of fraudulent misrepresentations in the application for insurance, in which the insured denied receiving treatments from a heart specialist during the ten weeks prior to and on the day of the signing of the application, denied ever having suffered from any ailment of the heart, and denied that he had ever been examined for or made any application for life insurance to any other company.

The jury returned a verdict in the amount of $40,000 in favor of petitioner, and respondent's timely motion for judgment in accordance with its motion for a directed

verdict under Rule 50(b) was denied by the District Court (1a, 109a, 112a). Respondent appealed from the denial of this motion to the United States Court of Appeals for the Third Circuit. That court, consisting of Chief Judge Biggs and Circuit Judges Goodrich and Hastie, reversed the judgment in favor of petitioner with instructions to enter judgment in favor of respondent (Petitioner's Appendix B, Petition, pp. 16-24).

The two insurance policies in suit (Exhibits P-1 and P-2), in the total amount of $40,000, were issued in connection with a large insurance program to support Stopper's participation in a new partnership, formed specifically to do the engineering work on the now notorious Tobyhanna Signal Corps project (49a-51a, 53a-56a). Part 1 of the application for the policies was dated July 16, 1951 and Part 2 of the application was dated July 13, 1951; both parts were signed by the insured (103a-106a).

In Part 1 of the application Stopper made the following answer to question 7(b):

> "7(b). Is any application [for life, accident or health insurance] or reinstatement, pending or contemplated in any other company? (Give details.)
>
> "No."

In Part 2 of the application Stopper made the following answers to questions:

> "13. Have you ever been examined for or made application to any life, health, or accident insurance company, or have you any application pending, on which a policy has not been issued . . . ?
>
> "No."
>
> "16(b). Have you ever suffered from any ailment or disease of the heart, blood vessels, or lungs?
>
> "No."

"19. What . . . physicians have you consulted or been treated by in the last five years? (Give details below.)

"Dr. Daniel Pearson (sic), 1830 Delancey Street.

"Goes twice yearly to Dr. Pearson (sic) for physical examination. No illness."

Stopper certified that he read the answers and they were full, true and complete (103a, 104a).

The death certificate which petitioner offered in evidence showed that the insured died on October 12, 1951 of a coronary thrombosis (12a, 13a).

Respondent's principal witness was Dr. Daniel B. Pierson, Jr., a specialist in cardiology (25a), who was the insured's personal physician for a long time prior to his death (27a). Dr. Pierson's office records, which were admitted in evidence (Exhibit D-9, 107a-108a), showed that in the period from May 3 to July 13, 1951, the date of Part 1 of the application, Stopper made six visits to his office, complaining of pains around the heart, shortness of breath, sweating and an "all-gone" feeling, none of which he had complained of before (28a, 30a, 31a, 41a). Dr. Pierson prescribed daily medication of aminophylline and other drugs and emergency administration of nitroglycerin for the treatment of angina pectoris (31a-34a).

During the first month of these treatments between May 3 and June 11, Dr. Pierson ordered an electrocardiogram and X-rays of the chest, followed by a Master two-step electrocardiogram at Lankenau Hospital (28a, 29a, 30a). The chest X-ray and the Master two-step electrocardiogram revealed abnormality of the aorta and a condition which Dr. Pierson concluded resulted from a narrowing of the coronary vessels (29a, 30a).

During this period of treatment Dr. Pierson twice ordered Stopper to return for an immediate follow-up, the first time, a week after June 14 (30a), then two days after July 11 (33a). When he reported back on the same day

Part I of the application was signed, July 13, Stopper was still complaining of precordial discomfort (34a). Dr. Pierson therefore prescribed a new drug for angina to be administered once at bedtime and building up to three times a day, and he continued the emergency treatment of nitroglycerin as needed (34a). Dr. Pierson's clinical records showed that during the period May 3 to July 13, 1951, Stopper experienced and complained of more than twelve attacks of heart pains (28a-34a).

Stopper made no reference at all to these heart treatments in his answer to question 19 in the application, and asserted that he consulted Dr. Pierson twice yearly only "for physical examination, no illness" (104a, 106a).

Respondent also offered in evidence an application for life insurance policies made to the Pan American Life Insurance Company in the total amount of $50,000 which was signed by Stopper on June 5, 1951 in Philadelphia (Exhibits D-1 and D-2, 13a-14a). These policies were never issued because Stopper failed to furnish an electrocardiogram and chest X-ray (15a, 17a). Despite repeated telephone requests to Stopper between June 15 and August 2, 1951 (15a-17a), by the Pan American General Agent for this medical information, the current electrocardiogram and chest X-ray were never furnished (17a).

At the close of its case and again at the close of all the evidence respondent moved for a directed verdict (44a, 87a). The motion was denied each time (44a, 87a), and the jury returned a verdict for petitioner (101a).

On appeal to the Court of Appeals for the Third Circuit, Chief Judge Biggs, and Circuit Judges Goodrich and Hastie, in an opinion by Judge Hastie, reversed the judgment of the District Court with instructions to enter judgment for the defendant on two independent grounds: (1) that on the basis of the clinical records of the insured's own heart specialist his "unquestionably false statements" were fraudulent as a matter of Pennsylvania law; and (2) that Stopper's denial of ever having made application to

any life insurance company was also fraudulent as a matter of law because the documentary evidence showed that the insured executed the Pan American application on June 5, 1951 in the presence of the medical examiner just five weeks before the pertinent denial in respondent's application (Petitioner's Appendix B, Petition, pp. 16-24).

Petitioner filed a petition for rehearing in the court below in which she failed to raise any question of the alleged violation of her constitutional right to a trial by jury under the Seventh Amendment to the United States Constitution. The court below denied this petition without opinion (Petitioner's Appendix D, Petition, p. 26).

Subsequently, this petition for a writ of certiorari was filed alleging that petitioner's right to a trial by jury under the Seventh Amendment had been violated by the entry of judgment notwithstanding the verdict by the court below, and that the decision of the court was not in accordance with the Pennsylvania law.

SUMMARY OF RESPONDENT'S ARGUMENT.

The petition for certiorari should be denied for the following reasons:

1. The consfitutional question concerning the alleged violation of petitioner's right to trial by jury under the Seventh Amendment to the United States Constitution was not presented to or decided by the court below, and it should therefore not be considered for the first time upon a petition for certiorari. Petitioner's constitutional right was not infringed because the court followed the procedure prescribed by the Federal Rules of Civil Procedure in entering judgment notwithstanding the verdict upon respondent's timely motion under Rule 50(b) for judgment in accordance with its motion for a directed verdict.

2. The case involves only the application of well established principles of Pennsylvania insurance law to the special facts in evidence, and it was decided in complete accord with the decisions of the Pennsylvania courts. It does not merit review upon petition for certiorari.

ARGUMENT.

I. The Constitutional Question Which Petitioner Attempts to Raise Here Was Not Presented to the Court Below and Should Therefore Not Be Considered.

For the first time in her petition for certiorari petitioner claims that the court below deprived her of the right to trial by jury in violation of the Seventh Amendment to the United States Constitution (First Question Presented for Review, Petition, p. 2). This question should not be considered by this court because it was not presented to or decided by the court below.

At no stage of the proceedings in the District Court or in the Court of Appeals was there any suggestion that the entry of judgment notwithstanding the verdict on defendant's motion under Rule 50(b) of the Federal Rules of Civil Procedure would deprive petitioner of her right to trial by jury in violation of the Seventh Amendment. Not even in the petition for rehearing, which was filed after the adverse decision below, did petitioner contend that her constitutional right had been infringed. Generally, a constitutional question raised for the first time in a petition for reargument and not decided by the court below, comes too late for review by this court. *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932); *Herndon v. Georgia*, 295 U. S. 441 (1935).[2] *A fortiori* where a constitutional question is not raised at all in the court below, even in a petition for rehearing, it will not be considered for the first time here. *Trailmobile Co. v. Whirls*, 331 U. S. 40, 50

2. *Herndon* is frequently cited in per curiam decisions dismissing for want of jurisdiction. See, for example, *Southwestern Bell Telephone Co. v. Lee*, 311 U. S. 609 (1940); *Saenger Realty Corp. v. Grosjean*, 310 U. S. 613 (1940); *W. T. Carter & Bros. v. Short*, 308 U. S. 513 (1939).

(1947); *Wong Tai v. United States*, 273 U. S. 77, 78-79 (1927); *Rodriquez v. Vironi*, 201 U. S. 371, 377 (1906).

Even though this impediment to review by this court did not exist, the court should not consider the alleged constitutional question because the Court of Appeals followed the established procedure under the Federal Rules of Civil Procedure in reversing the judgment in favor of petitioner with directions to enter judgment in favor of respondent. See *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254 (1940). At the close of its case and again at the close of all the evidence respondent made its motion for a directed verdict under Rule 50 (44a, 87a). These motions were denied (44a, 87a). After the verdict in favor of petitioner, respondent filed a timely motion for judgment in accordance with its motion for a directed verdict (1a, 109a), thus preserving for the Court of Appeals the legal question of the sufficiency of the evidence to support petitioner's verdict. When that motion was denied by the District Court (112a) respondent appealed to the Court of Appeals.[3]

The procedure under Rule 50 in the federal courts is essentially similar to the procedure under the Pennsylvania law by which a party who has moved for a directed verdict in the trial court may preserve a legal question for review by the Supreme Court, which is empowered to enter judgment notwithstanding the verdict after the denial of the motion by the trial court. Act of May 20, 1891, P. L. 101 § 2, 12 P. S. 1164. See *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48, 52-53 (1952). This statutory procedure has often been followed by the Pennsylvania Supreme Court in entering judgment for defendant notwithstanding the verdict in insurance cases like this one, where bad faith is inferred as a matter of law from documentary evidence showing recent medical consultation and

3. Respondent also appealed from the denial by the District Court of its motion for a new trial, but in view of the decision of the Court of Appeals on the motion for judgment, that ruling was not considered by the court below.

treatment which was not disclosed in an insurance application. *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81 (1941); *Derr v. Mut. Life Ins. Co. of N. Y.*, 351 Pa. 554, 41 A. 2d 542 (1945); *Kizirian v. United Beneficial Life Ins. Co.*, 383 Pa. 515, 119 A. 2d 47 (1956).

This court has frequently considered the application of Rule 50(b) of the Federal Rules of Civil Procedure. See *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952); *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U. S. 571 (1948); *Fountain v. Filson*, 336 U. S. 681 (1949). In all of these cases the court has recognized that if the party against whom a verdict is returned has moved for a directed verdict and after an adverse verdict files a timely motion under Rule 50(b) for judgment in accordance with its motion for a directed verdict, the Courts of Appeals are empowered to enter judgment notwithstanding the verdict. In none of these cases was it ever suggested that to do so would deprive the party in whose favor the verdict was rendered of its right to a trial by jury in violation of the Seventh Amendment to the Constitution.[4] In fact, as this court observed in the *Johnson* case, *supra*, at 344 U. S. p. 52, the very object of Rule 50(b) was to provide "a precise plan" by which a party could obtain a judgment notwithstanding the verdict in the federal courts, unimpeded by the procedural hazards which had been encountered in the earlier cases. See, for example *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913); *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389 (1937).

There was no violation of petitioner's constitutional right to a jury trial in the procedure followed by the Court

4. Before the Federal Rules of Civil Procedure were promulgated, it was held that the entry of judgment notwithstanding the verdict by a Court of Appeals in a diversity action did not violate the right of trial by jury guaranteed to a party in the federal courts by the Seventh Amendment. *Baltimore & Carolina Lines, Inc. v. Redman*, 295 U. S. 654 (1935).

of Appeals.[5] Since the alleged constitutional question was not presented to or decided by the court below, it should not be considered by this court for the first time upon petition for certiorari.

II. This Case Does Not Merit Review Upon Certiorari Because It Involves Only the Application of Well-Established Principles of Pennsylvania Law to the Special Facts in Evidence and It Was Decided in Complete Accord With the Decisions of the Pennsylvania Courts.

As the Supreme Court of Pennsylvania has done many times, the Court of Appeals in this case inferred from the documentary evidence that the insured's misstatements in his application for insurance were fraudulent as a matter of law and entered judgment notwithstanding the verdict. Far from presenting questions of "important and . . . far reaching effect," as petitioner contends (Petition, p. 14), this case only involves the application of long recognized principles of Pennsylvania law to the special facts which were established by the documentary evidence. Such a case does not merit review upon petition for certiorari.

The court below based its decision upon two separate grounds, each of which was self-sustaining and would alone have supported the entry of judgment in respondent's favor. First, the court concluded that on the uncontradicted documentary evidence from the records of the insured's own physician there was "a clear picture of willful misrepresentation in answer to Manhattan's inquiry about recent medical consultation and treatment" (Petitioner's Appendix B, Petition, p. 21). Secondly, the court decided

5. Cases under the Federal Employers' Liability Act, such as *Wilkerson v. McCarthy*, 336 U. S. 53 (1949), *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29 (1944), *Rogers v. Missouri P. R. Co.*, 352 U. S. 500 (1957), and *Webb v. Illinois Central R. Co.*, 352 U. S. 512 (1957) and cases under the Jones Act such as *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521 (1957), upon which petitioner relies, are not in point.

that "while the knowingly false statement of the insured concerning the nature and frequency of his recent visits to Dr. Pierson was in itself a sufficient ground for directing a verdict for the insurer, we find it equally clear that Stopper made a willfully false statement in answer to an inquiry about other insurance applications" (Petitioner's Appendix B, Petition, p. 23). In reaching these conclusions the court applied the Pennsylvania law correctly.

Petitioner pretends to find a new rule in the decision of the court below under which the court set "its own standards to determine the fact of misrepresentation, instead of following the law of the State forum" (Petition, p. 14). She argues that the court concluded, "contrary to the law of Pennsylvania," that "a knowingly false statement by an applicant establishes a conclusive presumption of fraud which permits no evidence to the contrary" (Petition, p. 8). These arguments are entirely without foundation.

Far from disregarding the law of Pennsylvania, the Court of Appeals followed it scrupulously and, in fact, accepted as the basis for its decision *petitioner's own statement* of that law which appeared in her brief filed in the court below. As Judge Hastie stated in his opinion: "Appellee's [petitioner's] brief properly recognizes that under the law of Pennsylvania, as applicable to a case like this, the trial court should direct a verdict for the insurer 'if the uncontradicted documentary evidence shows that statements in the application were false and that insured either knew they were false, or otherwise acted in bad faith in making them' " (Petitioner's Appendix B, Petition, p. 21). This statement of the Pennsylvania law was adopted verbatim from petitioner's own brief filed below (See Respondent's Appendix, p. 19), and it correctly states the law which is uniformly applied by the Pennsylvania Supreme Court in cases of this kind.

In *Evans v. Penn Mut. Life Ins. Co.*, 322 Pa. 547, 186 Atl. 133 (1936), where petitioner purports to find a rule

different from that which was applied by the Court of Appeals here, the Pennsylvania Supreme Court stated (at 322 Pa. 553-554, 186 Atl. 138):

> "The insurer must thus establish, in order to avoid the policy in the case of misrepresentations, that the statements relied on were falsely and fraudulently made. It is sufficient to show that they were false in fact and that insured knew they were false when he made them [citation omitted], since an answer known by insured to be false when made is presumptively fraudulent . . . *The circumstances preceding and attending the making of the statements may be such that the insured must be said to have been aware of their falsity at the time, or that an inference of fraud is otherwise irresistible, as for instance where an unreported illness or disability of insured was so serious and so recent that he could not have forgotten it.*" (Emphasis supplied.)

From the uncontradicted documentary evidence in the records of the insured's own heart specialist, Dr. Pierson, the court below found as a matter of law, just as the Pennsylvania Supreme Court would have done, that the dramatic, painful and persistent symptoms which the insured reported on his six visits to his physician, the chest X-rays, electrocardiogram, Master two-step electrocardiogram, and the regular medication of drugs and emergency prescriptions of nitroglycerin were significant facts relating to the insured's state of health, the concealment of which could only have been fraudulent. Coupled with his reference in the application to semi-annual visits for physical check-ups by his physician and the statement "no illness", his failure to disclose them could only be construed as willful concealment of recent medical consultations and treatment.

In thus inferring bad faith as a matter of law, from this documentary evidence, the court below followed and

quoted from the leading Pennsylvania case of *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81, (1948), where the Supreme Court of Pennsylvania said, by way of particularizing the rule in the *Evans* case, *supra* (at 342 Pa. 409, 21 A. 2d 84):

> ". . . Thus, where it is established by uncontradicted documentary evidence that the insured has consulted physicians so frequently, or undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance, *bad faith may be inferred as a matter of law if the insured denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received during the period of inquiry.*" (Emphasis supplied.)

That the Supreme Court of Pennsylvania would have entered judgment for respondent notwithstanding the verdict, just as the court below did here, is easily demonstrated by reference to the Pennsylvania cases.[6] In the *Freedman* case, *supra*, the Pennsylvania Supreme Court entered judgment for the defendant on documentary evidence of visits to a number of physicians during a four-year period prior to the date of the application, where the insured denied having consulted any physician in the preceding five-year period. The application was made eight months before he

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6. In the case of *Burton v. Pacific Mut. Life Ins. Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), upon which petitioner principally relies, but which is distinguishable on its facts as the court below pointed out, the Supreme Court of Pennsylvania noted the rule which applies to a case such as this one and said at 368 Pa. 615-616, 84 A. 2d 312: "Thus, where a person who has been treated over a period of time for a heart condition and fails to report it dies of coronary occlusion or coronary thrombosis, his beneficiary may not recover: *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81; *Derr v. Mut. Life Ins. Co.*, 351 Pa. 554, 41 A. 2d 542."

died of a heart attack. There was no evidence that the insured was told or knew that he had a heart condition.

In *Derr v. Mut. Life Ins. Co. of N. Y.*, 351 Pa. 554, 41 A. 2d 542 (1945), the Supreme Court of Pennsylvania entered judgment in favor of the insurance company notwithstanding the verdict in a case where the insured, as here, was "an active, competent businessman" (*id.* at 351 Pa. 559, 41 A. 2d 544) who disclosed in his application the name of his personal physician and admitted only that he had been under his care for colds in the past five years but denied having had any treatment or observation in a hospital. The hospital records showed that almost a year prior to the application the insured had gone there for a check-up which disclosed a small stone in the lower end of the right ureter.

In *Reeder v. Metropolitan Life Ins. Co.*, 340 Pa. 503, 17 A. 2d 879 (1941), the Supreme Court affirmed judgment for the defendant where the insured admitted in his application that he had consulted a physician whose identity was disclosed, but asserted that it was for only a moderate attack of indigestion, and the record showed other consultations for his general physical condition, and advice from one physician to have his heart examined during the seven-month period preceding the application. The insured died of a heart condition nearly two years after the date of the application.

In *Croll v. John Hancock Life Ins. Co.*, 198 F. 2d 562 (3rd Cir. 1952), the court below, following the Pennsylvania law, concluded that the documentary evidence of the insured's physician's office records, showing a number of visits in which he complained of pains in the chest and other chest symptoms with complaints of epigastric and back pains, established fraud as a matter of law.[7] There was

7. The court said (at pp. 564-65): "No juror should be asked to believe that decedent at the time he made his application may have forgotten his chest pains or the electrocardiogram taken in the hospital or the many visits to his physician during a relatively short period of

no evidence that the insured was told of the heart condition of which he died more than a year following the application. The evidence showed that he was actively engaged in operating a gas station and that he continued to perform all the arduous duties connected with it without respite and without being warned to discontinue them by his physician.

From the foregoing cases, and the other cases cited in the opinion of the court below, it is clear that the court correctly applied the Pennsylvania law in entering judgment for respondent notwithstanding the verdict on the first ground of its decision alone.[8]

As to the second ground of the decision, petitioner asserts that the court below "held that the denial of other insurance applications was fraudulent, without regard to the materiality of the statement" (Petition, p. 9). She then states, without any supporting authority whatever, that "where there has not been a rejection of the risk, the negative answer is immaterial and such immateriality makes the good faith of the insured, in so answering, a question of fact and not of law which must be decided by a jury" (Petition, p. 9). This was not the holding of the court below and, in fact, there is no such principle in the Pennsylvania law.

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time. *Appellant stresses the fact that decedent may not have known of his heart condition. The most uneducated and unsuspecting person, however, is as keenly aware as anyone of pains in the chest, shortness of breath, and stomach and intestinal distress.*" (Emphasis supplied.)

8. As for petitioner's claim that the court below "disregarded the distinction made by the Supreme Court of Pennsylvania between the cases in which the insured concealed either hospitalization or the names of one or more doctors that treated him and those in which the insured, *just as in the instant case*, disclosed hospitalization and the name of the doctor or doctors that treated him and failed to give all the details" (Petition, pp. 9-10), it is sufficient to point out that in this case the insured *concealed* the fact that Doctor Pierson was treating him for heart symptoms and declared that he only consulted him for "*physical examinations—no illness*" (104a, 106a).

The purpose of the questions in the Manhattan application concerning other insurance applications was to enable respondent to secure from other insurance companies information material to the risk. *Haig v. Prudential Ins. Co. of America*, 348 Pa. 614, 617, 36 A. 2d 470, 471 (1944). "Inaccurate statements as to . . . previous illness not of a trivial nature, or a denial that insurance had been sought from other companies when in fact it had been, are all to be deemed material representations." *Ratkovic v. Metropolitan Life Ins. Co.*, 126 Pa. Super. 492, 496, 191 Atl. 201, 202 (1937). That the information about the June 5th Pan American application which the insured withheld was material is obvious, as the court below necessarily recognized. If the insured had disclosed the pending Pan American application, respondent could have learned two important facts which would have affected its decision on accepting the insured as a risk: (1) that Stopper was engaged in assembling an extraordinarily large program of insurance coverage for a man of his advanced age (58a);[9] and, more important, (2) that despite repeated requests, he had failed to furnish a *current* electrocardiogram and chest X-ray to Pan American (15a-17a).

Petitioner's argument that there was evidence to support the jury's finding that Stopper was unaware of the pending Pan American application or that it had been abandoned, was properly rejected by the court. As Judge Hastie pointed out in his opinion, question 13 in part 2 of the application was in the alternative and required the insured to state whether he had "ever been examined for or made application to any life, health or accident insurance company" without obtaining a policy *or* whether he had "any application pending on which a policy has not been issued . . . ." The court necessarily concluded that his written denial of the Pan American application which was

9. As of the date of the Manhattan application for $40,000, he had already obtained $25,000 from Dominion Life, and had applied for another $50,000 from Pan American (58a, 13a-14a).

signed on June 5th in the presence of the medical examiner, was "wilfully false" because "the question was in alternative form and he must have realized that the Pan American application was covered by at least one of the stated alternatives. Cf. *Blough v. Modern Woodmen of America*, 1946, 159 Pa. Super. 249, 48 A. 2d 37; *Matovich v. Mut. Benefit, Health & Accident Ass'n.*, 1945, 157 Pa. Super. 604, 43 A. 2d 648"[10] (Petitioner's Appendix B, Petition, p. 24).

With the documentary evidence of Dr. Pierson's office records and the Pan American insurance application, the decision of the court below is unassailable on either of the two independent grounds upon which it rests. Judge Hastie's concluding paragraph fairly summarizes the case and the attitude of the Pennsylvania courts toward evidence of this character (Petitioner's Appendix B, Petition, p. 24):

> "It is our conclusion that the documentary evidence so palpably disclosed the perpetration of a fraud upon the insurer that the direction of a verdict for the defendant was the only course consistent with law and justice. We are confident that the courts of Pennsylvania would reach the same conclusion on these facts."

This case involves only the application of well established principles of Pennsylvania insurance law to the special facts in evidence. The court below correctly applied these principles in reversing the judgment with instructions to enter judgment in favor of respondent. Its decision does not merit review upon petition for certiorari.

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10. The court might also have cited in support of its conclusion *American Union Life Ins. Co. v. Judge*, 191 Pa. 484, 43 Atl. 374 (1899). In that case the insured denied in his application that any other application had been rejected or postponed. He testified that he had not been informed of the rejection of his application by the other company, although this fact had been communicated to his broker. The lower court held that even though the insured may not have known the precise status of the prior application, his failure to disclose that the application had been made and not yet acted upon was not in good faith. Its decision was affirmed per curiam by the Supreme Court.

III. Conclusion.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Excerpt From Brief for Appellee (Petitioner) Filed in the United States Court of Appeals for the Third Circuit as of No. 11,897.

The following excerpt appears on page 11 of the brief filed by petitioner in the court below:

"II. The Court May Direct a Verdict for the Insurer Only *If the Uncontradicted Documentary Evidence Shows That Statements in the Application Were False And That Insured Either Knew They Were False, or Otherwise Acted in Bad Faith in Making Them.*" [11]

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11. The italicized portion of this excerpt was quoted by the court below in its opinion (Respondent's Brief, p. 11, *supra*).

Office Supreme Court, U.S.
FILED
JUL 5 1957
JOHN T. FEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1049~~ 156

CONSTANCE A. STOPPER,
Petitioner,
v.
THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,
Respondent.

ADDENDUM TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

In respondent's brief in opposition to petition for certiorari it is stated that petitioner failed to raise any question of the alleged violation of her right to jury trial under the Seventh Amendment even in her petition for rehearing in the court below (Respondent's Brief, pp. 6, 7). This is not entirely accurate.

After the printed petition for rehearing was served upon respondent, counsel for petitioner by letter to counsel for respondent advised that the following paragraph, which did not appear in the printed petition, would be added to the petition filed with the court below:

> "16. The entry of judgment for defendant violates the Seventh Amendment of the United States Constitution."

Respondent thereafter informed the court clerk that it would file no answer to the petition, since the added paragraph, though belatedly raising a new issue, presented no

question of sufficient significance to require an answer. The court below then dismissed the petition without opinion.

Thus, although the alleged constitutional question was presented to the court below as a written addendum to the printed petition for rehearing, it was not decided by the court and comes too late for review by this court. *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932); *Wall v. Chesapeake & Ohio Ry.,* 256 U. S. 125 (1921); *Godchaux Co. v. Estopinal,* 251 U.S. 179 (1919).

Where a constitutional question which could have been anticipated is raised in the court below for the first time in a petition for rehearing, it will not be considered here. *Herndon v. Georgia,* 295 U. S. 441 (1935). In that case this court refused to consider the constitutional argument raised first in a petition for rehearing in the Supreme Court of Georgia since no federal question was seasonably raised in the court below. This court found that the statute in question had in an earlier case been construed in substance in the same manner, and that the defendant "was therefore bound to anticipate the probability of a similar ruling in his own case." *Id.* pp. 445-446.

So, here, the decision of the court below was based on numerous Pennsylvania authorities, all of which were cited to the trial court and the court below, holding that judgment notwithstanding the verdict may be entered where the uncontradicted documentary evidence shows that the insured's statements in his application were false and that he either knew they were false or otherwise acted in bad faith in making them. Petitioner was bound to anticipate the entry of judgment against her by the Court of Appeals on the basis of a similar application of this well established rule to the evidence in this case. If the entry of judgment notwithstanding the verdict raised a constitutional question concerning her right to trial by jury under the Seventh Amendment, she was bound to make this argument at the first instance in the court below, and, indeed, to raise it as a

bar in the trial court. Since the alleged constitutional question was raised for the first time in the petition for reargument and not decided by the court below, it comes too late for review here.

For this and the other reasons set forth in respondent's brief, the petition for certiorari should be dismissed.

Respectfully submitted,

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